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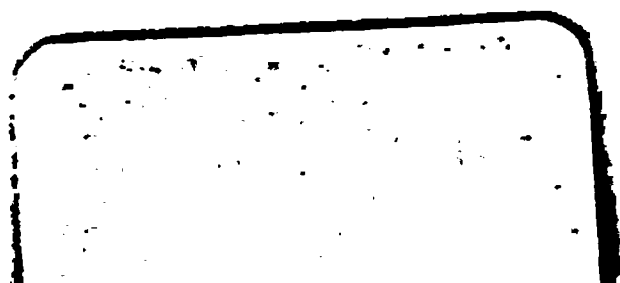
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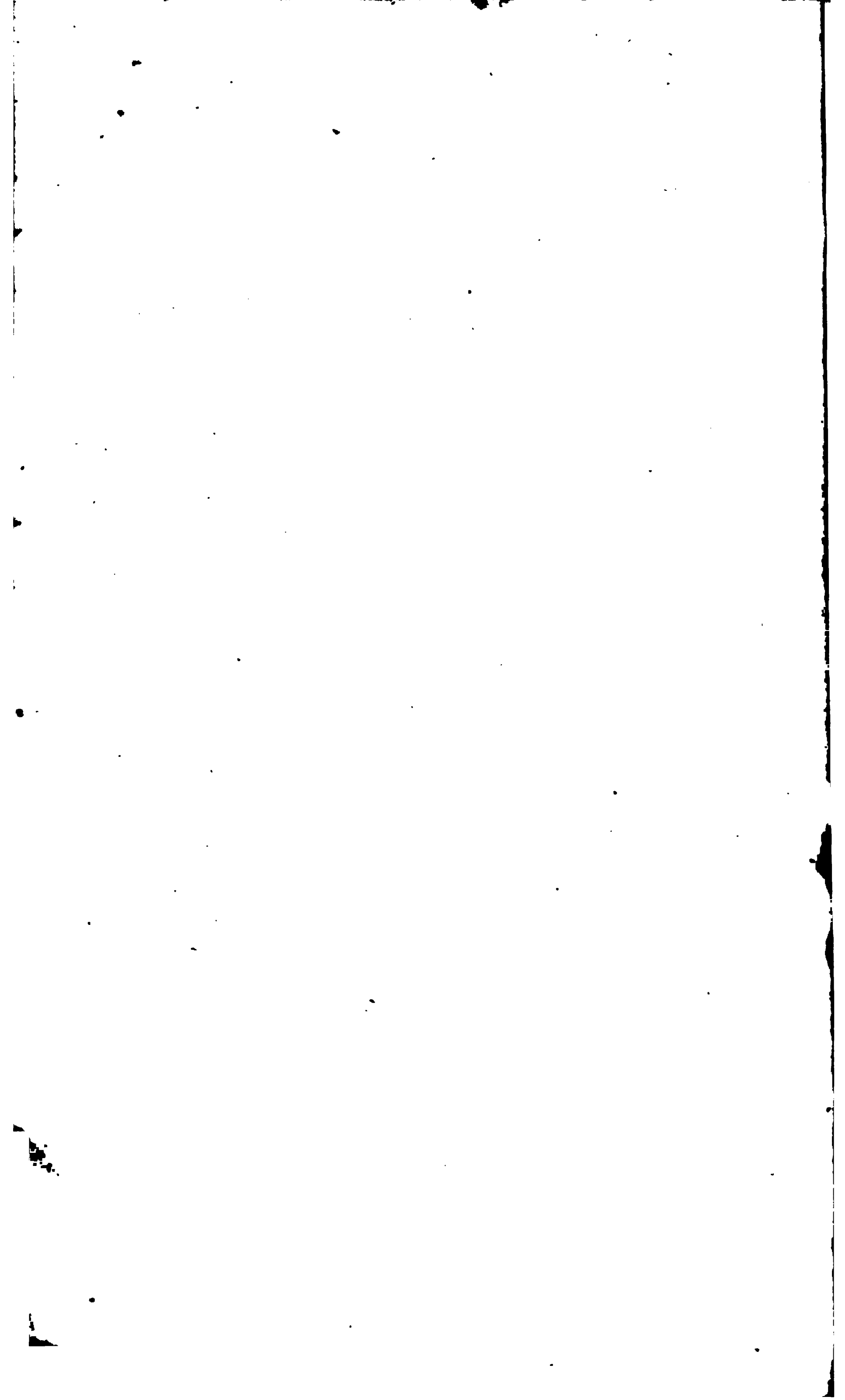




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**TREATISE**  
OF THE  
**RIGHTS, DUTIES, AND LIABILITIES**  
OF  
**HUSBAND AND WIFE,**  
AT LAW AND IN EQUITY.

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By **JAMES CLANCY, Esq.**

**BARRISTER AT LAW.**

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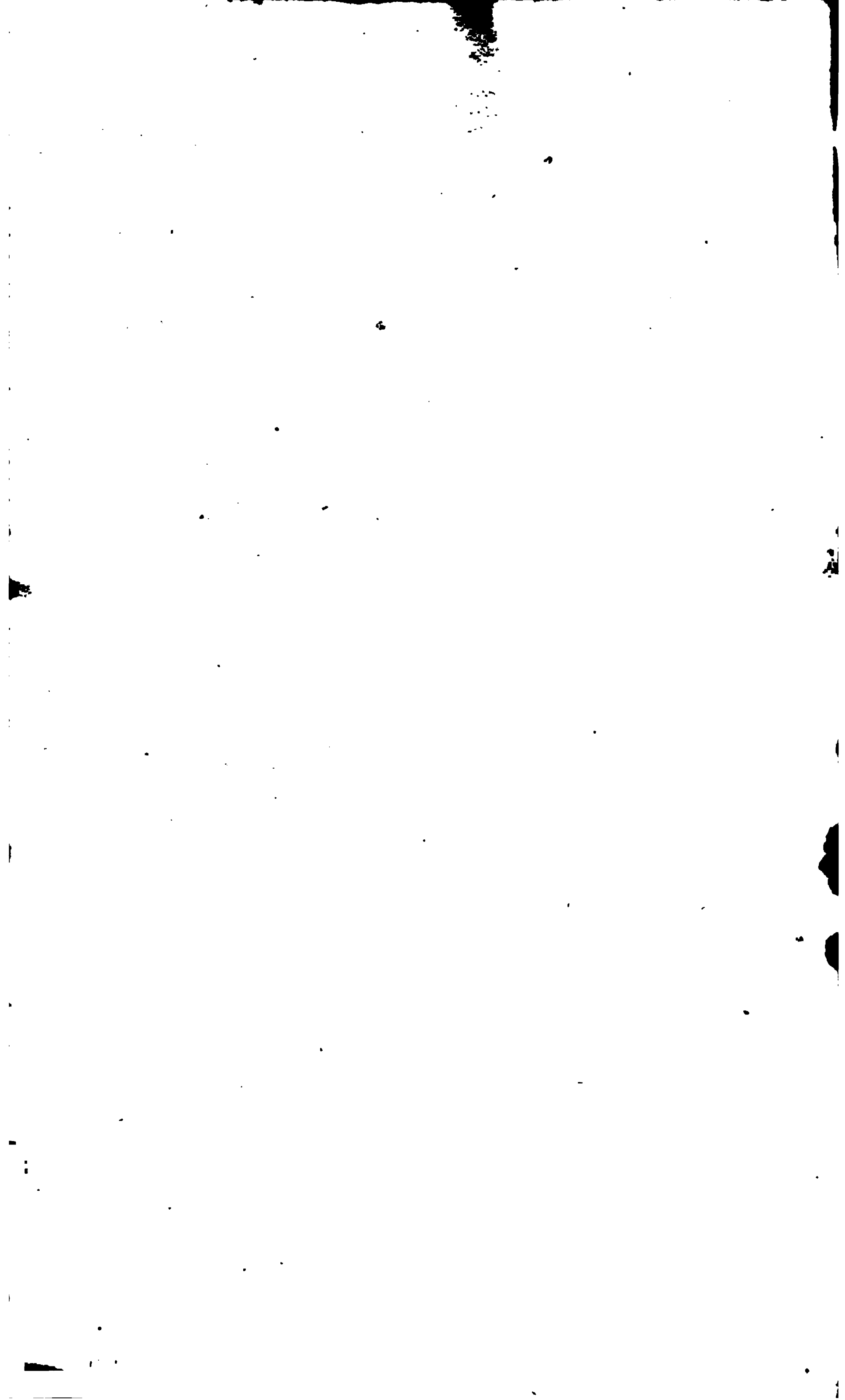
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**1828.**



TO  
THE RIGHT HONOURABLE  
**THOMAS LORD MANNERS,**

BARON MANNERS OF FOSTON, IN LINCOLNSHIRE ;

LORD HIGH CHANCELLOR OF IRELAND,

&c. &c. &c.

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**THE** present Edition differs so materially from the last, that it is deemed right to apprise the Profession of the particulars in which this difference consists. The quantity of its matter is greater by at least one half, although the more compressed form of the printing has prevented an excess to the same extent in the number of its pages. This additional matter is composed, not only of the new cases brought down to the present time, upon the subjects of which the Second Edition treats, but also of sixteen chapters, containing topics altogether new. The plan also of the work has been altered and enlarged. In the last Edition, the Author confined his views solely to the rights of the wife, as they are administered in a court of equity, and to the doctrine which allows her separate property, and a separate character. The present Edition, extends to both the legal and equitable rights, not only of the wife, but of the husband also, in which the duties and liabilities which flow from this relation are fully discussed. The Work is divided into Five Books ; the first treats of the respective interests of husband and wife in the personal property of each other, the husband's liability, and the duration and extent of it, for the debts of his wife contracted *before* and *during* the marriage, her power of charging him with her

engagements contracted *during* the marriage and the extent of it, and also the right she may have *after* the marriage by survivorship in her own personalty. The second book treats of the respective rights of husband and wife in the *real* property of each other, during and after the marriage, viz. Curtesy, and Dower, the Jointure before marriage which will bar the right of dower, and the provisions made during marriage which will put the wife to her election. The third, fourth and fifth books contain the subjects which were considered in the last publication of the work, with this addition, that the fifth book is not confined to the peculiar doctrine of the wife's equity, but embraces all the equities which both husband and wife may be entitled to, as such, arising from the property of the wife alone.

*King's Inns,  
Henrietta Street, Dublin.*

May 18, 1827.



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# BOOK I.

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## CHAPTER I.

### OF THE HUSBAND'S INTEREST IN, AND POWER OVER THE PERSONAL PROPERTY OF HIS WIFE.

It is a general rule of the common law of England, that a married woman cannot possess personal property, and that every thing of this nature to which she is entitled at the time of her marriage, and which accrues in her right during its continuance, is vested solely in her husband. It appears so far back as the history of English jurisprudence can be traced, that marriage conferred on the husband the dominion over the possessions of his wife. "*Omnia, quæ sunt uxoris, sunt ipsius viri, non habet potestatem sui, sed vir*," is the language of one of the earliest writers known to the law, in his description of the effects produced by marriage on the property of the woman.

At the common law, wife incapable of possessing personal property.

Wife's personality vests in the husband.

In the contemplation of our law, the wife is scarcely considered to have a separate existence; she and her husband constitute but one person, and all the rights and duties, which are hers at the period of the marriage, become his during the continuance of that union. "*Vir et uxor sunt quasi unica persona, quia caro una et sanguis unus.*"<sup>b</sup> It is for this reason that a man cannot, by any conveyance at the common law, limit an estate to his wife<sup>c</sup>; and that if a joint estate be to husband and wife, and to a third person,

Husband and wife but one person.

<sup>a</sup> Brac. lib. 2. c. 15. Co. Lit. 112 b.

<sup>b</sup> Brac. lib. 5. 1. Co. Lit. 112 b.

<sup>c</sup> Co. Lit. 112 a.

the husband and wife would take a moiety only, and the third person would have the other moiety.<sup>d</sup> This unity of the persons of husband and wife in the source from which her disability to possess personal property is derived. It is for the same reason, namely, the unity of the persons of husband and wife, that the property of both is placed under the controul and management of one of them; and the law has selected the husband, as being the more worthy of this trust. "The husband is the head of the wife, and therefore all that she hath belongs to him."<sup>e</sup>

Personalty consists of chattels personal, choses in action and chattels real.

Personal property, to which a woman may be entitled at the time of her marriage, or during it, consists of three kinds, viz. chattels personal, choses in action, and chattels real, all of which the law vests in her husband; and as the extent of his right to them varies, that is, as his property in them is absolute or qualified according to the nature of the personalty, it becomes expedient to consider it under the above distribution. Chattels personal are, as Sir William Blackstone observes<sup>f</sup>, things moveable, such as animals, household stuff, money, jewels, corn, garments, and every thing else, that can properly be put in motion, and transferred from place to place. Choses in action are things of which there is no immediate occupation, but merely a bare right to occupy, the possession whereof may be recovered by a suit or action at law.<sup>g</sup> Chattels real are such as concern or savour of the realty, as terms for years of land, the next presentation to a church, estates by statute merchant, statute staple, elegit, or the like.<sup>h</sup>

Personal chattels of wife vest absolutely in the husband.

Marriage operates as an absolute gift to the husband of all the property coming under the above description of personal chattels, which were in the possession of the wife at the time of the marriage.<sup>i</sup> Property of this kind is vested actually in him, for he does not require the aid of any court of law or of equity to establish his claim to it, or to invest him with the possession of it: he takes it free from any

d Co. Lit. 189 a.  
e Finch's Law, 29.  
f 2 Black. Com. 387.

g 2 Black. Com. 396.  
h 2 Black. Com. 396.  
i Co. Litt. 351 b.



right of survivorship in the wife : he may dispose of it in any way during his life, or bequeath it at his death ; and, if he make no such disposition of it, his personal representatives, and not his wife, though she should survive him, shall have it.

The husband takes the same interest in personal chattels, which come into his wife's possession in her own right during the coverture, whether it be by gift or bequest, or in any other way.

The husband is also entitled to all sums of money which his wife earns by her skill or labour, and these he has absolutely and in his own right, and not in hers ; and if he die without having recovered them, they do not survive to her, but his executors shall have them.<sup>j</sup> And therefore, if it be necessary to sue for them during the coverture, the action must be brought in the name of the husband alone ; and, if the wife be joined in it, the judgment will be erroneous.<sup>k</sup> Even where the wife had been actually paid for her services, it was held that the husband had a right to recover the amount, and if it had been paid after a notice had been given by him to the defendant not to pay her.<sup>l</sup>

Husband entitled absolutely to wife's earnings.

In like manner the husband is entitled absolutely to all sums of money which have been lent by his wife, or which have been received by a third person on her account during the marriage, and if he join her with him in actions for such causes, it would be error.<sup>m</sup>

Husband entitled to money lent by wife, or received by another on her account.

The husband has an absolute unqualified interest in such chattels of the wife as have been enumerated above, they being merely personal ; but his interest in that description of her property, which is called a chose in action, is more limited. Choses in action are mere rights arising from contracts expressed or implied, which must be asserted at law for the purpose of being reduced into possession,

Husband's interest in wife's choses in action only qualified.

<sup>j</sup> Buckley and wife v. Collier, Salk. 114.

<sup>k</sup> Buckley and Wife v. Collier, Salk. 114. Carth. 251.

<sup>l</sup> Glover v. Proprietors of Drury-lane, 2 Chitty's Rep. 117.

<sup>m</sup> Abbot and Wife v. Blofield, Cro. Jac. 644. Bidgood v. Way, 2 Sir W. Black, 1236.

Husband surviving takes wife's choses in action as her administrator, not by survivorship.

Wife entitled to her choses in action by survivorship.

Wife's choses in action accruing during coverture, vests in husband only conditionally.

Husband must join wife in action for choses in action accruing to her previous to marriage; may or may not for those accruing during marriage.

as money due on simple contract or by specialty, damages for the breach of promises expressed or implied, &c. &c. When such rights of action belong to a woman at the time of her marriage, they become vested in her husband, and he acquires a qualified property in them, that is, he may reduce them into possession during his wife's lifetime, and then they become his property absolutely; but if he die without having reduced them into possession, they become hers by survivorship, and, if she die in her husband's lifetime, he shall have them only as her administrator, and not by survivorship. And he may sue for and recover these choses in action without his wife's consent; however, she must always be a party to the suit.<sup>n</sup> And on the same principle the husband alone cannot be the petitioning creditor to support a commission of bankruptcy, where the debt was due to the wife while she was sole.<sup>o</sup>

The choses in action accruing to the wife during the coverture, as well as those belonging to her at the time of the marriage, are the husband's property only conditionally, that is, provided he reduce them into possession in her lifetime, and if he do not, and she should die first, then his right to them would be only as her administrator; but if he should die first, then she would take them absolutely by survivorship. These choses in action are bonds, and all other specialties executed to the wife, and also express assumpsits to her; and the difference between these rights, accruing to the wife during the marriage, and those previous to it, is this, that the husband must join his wife with him in actions for the latter, but he may or may not join her with him in actions for the former. As where a bond was executed to a *feme covert* during coverture, for which the husband alone declared, the defendant prayedoyer of the condition of the bond, and then demurred, because it appeared that the money was payable to the wife; and after divers arguments judgment was given for the plaintiff.<sup>p</sup> And even where a judgment has been obtained by both

<sup>n</sup> Rol. Ab. 347. Fenner v. Plasket, Moor. 422.

<sup>o</sup> Rumsy v. George, 1 M. & S. 176.  
<sup>p</sup> Howel v. Maine, 3 Lev. 403.

husband and wife, it has been held that the husband may alone sue out a *scire facias* for the damages and costs.<sup>q</sup>

The wife may also be joined with the husband in an action on a promissory note, passed to the wife alone during the coverture, as in *Philliskirk and Wife v. Pluckwell*,<sup>r</sup> where, on a motion for liberty to enter a nonsuit, on the ground that husband and wife were joined in an action on a note passed to her during the marriage, the court ruled that the action was properly brought. These two cases, *Howel v. Maine*,<sup>s</sup> and *Philliskirk and Wife v. Pluckwell*,<sup>t</sup> prove that the husband may join his wife with him, or sue alone, as he pleases, in an action on an obligation passed to her during the marriage.

Husband may join his wife with him in action on promissory note to her during coverture.

In like manner, where there is a special promise to the wife during coverture, in consideration of some service performed by her, the husband may join her in the action, or sue alone, as he thinks proper. As in *Prat and Wife v. Taylor*<sup>u</sup>, where the defendant promised the plaintiff's wife, that in consideration she had given him 10*l.* he would marry her daughter, and if not, that he would repay the money, husband and wife joined in an action on this promise; and on the objection, that it ought to have been brought by the husband alone, the Court ruled that it was rightly brought. So in *Fountain and Wife v. Smith*<sup>v</sup>, where a promise was made to the wife to pay her so much money, in consideration of her instructing the defendant's daughter in needle work, and the action on this promise was brought by husband and wife; it was held, that the husband might bring it in his own name, or in the names of himself and his wife. And in *Brashford in error v. Buckingham and wife*<sup>w</sup>, which was a writ of error in the Exchequer chamber of a judgment in the King's Bench; the error assigned was, that "the action was brought by husband and wife upon a promise to the wife during coverture, in consideration she would cure such a wound, to pay her 10*l.*, and for non-per-

Where action on a special promise to the wife during marriage, she may or may not be joined in it.

q 3 Lev. 403.

r 2 Maule & Selw. 393.

s 3 Lev. 403.

t 2 Maule & Selw. 393.

u Cro. Eliz. 61.

v 2 S.d. 128.

w Cro. Jac. 77. 90<sup>r</sup>

formance of this promise, they brought this action on the case. It was alleged that the husband alone should have had this action, it being a personal duty which accrued during coverture ; but the judgement was affirmed, because the action being grounded on a promise made to the wife, and upon a matter arising upon her skill, and upon a performance to be made by the person of the wife, so she is the cause of the action, and so the action brought in both their names is well enough, and such an action shall survive to the wife.

It appears from these cases of *Prat and Wife v. Taylor*<sup>x</sup>, *Fountain and Wife v. Smith*<sup>y</sup>, and *Brashford v. Buckingham and Wife*<sup>z</sup>, that where there is an express assumpsit to the wife during coverture, in consideration of her services, the husband may bring an action upon it, either in his own name alone, or jointly with his wife. It is material to be observed, that in all the instances which have been cited where the husband was held to be at liberty to sue either alone or jointly with his wife upon rights of action accruing to her during the marriage, these rights would have survived to her, if her husband had died before her without reducing them into possession. A bond executed to the wife during marriage would survive to her ; for where husband, as administrator of his wife, brought debt upon a bond given to her during the coverture, on demurrer to the declaration, it was objected the action should have been brought by the husband in his own right, because the wife never had any sole right of action in her ; but judgment was given for the plaintiff, because the right to the bond would have survived to the wife, if she had outlived her husband : and although the bond might have been sued by the husband alone in the wife's lifetime, yet after her death he must sue as her administrator.<sup>a</sup> So it seems a bill of exchange or promissory note, passed to the wife during the

Bond executed to wife during marriage survives to her.

Bills of exchange, promissory

x Cro. Eliz. 61.

y 2 Sid. 128.

z Cro. Jac. 77. 205.

a Day v. Pargrave, cited by Justice Dampier in *Philliskirk v. Pluckwell*, 2 M. & Sel. 396.

marriage, would survive to her;<sup>b</sup> and *Holloway v. Lightbourne*,<sup>c</sup> and *Hodges v. Beverly*,<sup>d</sup> in which the contrary was decided, have been overruled: and *Brashford v. Buckingham and Wife*,<sup>e</sup> is a direct authority to prove that a special assumpsit to the wife, in consideration of services to be performed by her, survive to her.<sup>f</sup>

notes, and special promises, to wife during marriage, survive to her.

But if the promise to the wife be not express, but only implied, that is, in effect, a promise to the husband himself, and does not survive to the wife. In *Buckley and wife v. Collier*,<sup>f</sup> husband and wife declared, that the defendant being indebted to them for work done by the wife, in making him a peruke, he promised to pay. To this there was a frivolous plea, to which plaintiff demurred; and the Court gave judgment for the defendant on these grounds, that there was no express promise laid to the wife, but merely the promise in law, and that must be to the husband, who must have the fruits of his wife's labour, for which he must bring a *quantum meruit*; and also that the advantage of the wife's work shall not survive to the wife, but shall go to the executors of the husband.

Implied promises to wife during marriage do not survive to her.

Besides these rights of action, which have their origin and completion during the coverture, there is another description of choses in action, which have their commencement before marriage, and are rendered perfect during it; and these also, although commencing while the wife was sole, may be sued for, either by the husband solely, or by him and his wife, if he shall think proper to make her a party to the suit. As in *Powes and wife v. Marshall*,<sup>g</sup> where goods were lost by a *feme sole*, who afterwards married, and then they were converted to the use of the defendant. Husband and wife joined in an action of trover for these goods; and it was moved, in arrest of judgment, that the action ought to have been brought by the husband alone; and of this opinion were the Chief Justice Hide and Justice Keeling: but Justice Twisden and Windham being

Where the cause of action to the wife has its origin before marriage, but is not complete until the marriage, husband may sue alone or join his wife with him.

<sup>b</sup> Nash v. Nash, 2 Mad. C. C. 133.

<sup>c</sup> Eq. Ab. 1.

<sup>d</sup> Bun. 188.

<sup>e</sup> Cro Jac. 77.

<sup>f</sup> Salk. 114.

<sup>g</sup> 1 Sid. 172.

of the opposite opinion, the judgment was affirmed. However, in an action of trover, similarly circumstanced, which was brought ten years later, the whole Court were of opinion that the husband might either sue alone or join his wife in the action with him.<sup>h</sup>

Where negotiable securities passed to the wife before marriage become due after it, husband may sue for them either jointly with her or alone.

The law is the same with respect to promissory notes and bills of exchange, which have been passed to the wife, while sole, and have become due after the marriage: they vest conditionally in the husband without any indorsement by his wife; and if an action be brought upon them, he may sue either singly by himself, or jointly with her. As in the case of *Mr. Neilage v. Holloway*,<sup>i</sup> where a bill of exchange was made payable to a *feme sole*, who married before it became due, and an action was brought by the husband alone to recover the amount, and a verdict was found for the plaintiff, it was ruled on a motion in arrest of the judgment, on the ground that the wife ought have joined in the action, that the husband might sue in his own name without joining his wife, although she had not indorsed the bill. This case was so decided on this principle, that a negotiable instrument payable to a *feme sole* does not lose its negotiability by her subsequent marriage; that her power of indorsement is lost,<sup>j</sup> and therefore it must be in the husband, and as he cannot indorse to himself, it must be on the ground of his having the entire interest in him without indorsement; and that, as he may transfer it by indorsement to any one, he may consequently bring an action on it in his own name.

If cause of action will survive to the wife, the husband may sue alone or join her with him; if it will not survive to her, he must sue alone.

The preceding cases proved that there are some causes of action accruing through the means of the wife during the coverture, for which the husband must sue alone; while there are others for which he may join his wife with him in a suit, or sue alone, as he pleases. And the criterion by which it may be judged, when he must sue alone, and when he may or not, seems to be this, if the cause of action will

<sup>h</sup> Blackborne and Wife v. Greaves,  
2 Lev. 107.  
<sup>i</sup> 1 Bar. & Al. 218.

<sup>j</sup> Connor v. Martin, cited in 3 Wilson, 5. 1 East, 432.

survive to the wife, then the husband may join his wife in the action for the recovery of it, or sue alone ;<sup>k</sup> but if it will not survive, then the husband must sue alone. In *Buckley v. Collier*,<sup>l</sup> *Abbot v. Blofield*,<sup>m</sup> and *Bidgood v. Way*,<sup>n</sup> the causes of action were the absolute property of the husband, in which his wife had no right of survivorship, and therefore the husband only could sue for them ; but in the instances of the bond and of the negotiable securities, and also where the causes of action were founded on express promises to the wife, the husband had only a qualified interest in them, which would have survived to the wife, and therefore it was held that the wife might be joined in these suits.

The husband has a qualified interest also in the chattels real or terms for years, of which his wife was possessed at the time of the marriage. He is possessed of these chattels during her life in her right ; he has power to aliene them at his pleasure, with or without consideration, during her life, and if he survive her, they are his absolutely.<sup>o</sup> But if the wife survive the husband, they are in that event hers. And though it should be an equitable interest, and the husband should find it necessary to have recourse to a court of equity to assert his right to the term, as where it has been vested in trustees for the benefit of the wife, still he may dispose of it as he will, unless the trust has been created with his privity and consent.<sup>p</sup>

Husband has a qualified interest in wife's terms for years, belonging to her at the time of the marriage.

Chattels real, whether they are legal or equitable interests, are not choses in action, because they do not stand in need of being reduced into possession, being in possession already, and lying in action ; yet, if the husband do not transfer them in his lifetime, which he may by grant or demise, he cannot dispose of them by will, and they will survive to his wife.<sup>q</sup> They are also liable for his debts

Husband cannot dispose of wife's terms for years by will.

<sup>k</sup> *Frosdike v. Stirling*, Freeman, K. B. 236.

<sup>l</sup> Salk. 114

<sup>m</sup> Cro. Jac. 644.

<sup>n</sup> 2 Sir W. Black. 1234.

<sup>o</sup> Co. Lit. 46 b. 300 a. 351 a.

<sup>p</sup> *Turner's case*, 1 Vern. 7. *Pitt v. Hunt*, 1 Vern. 18.

<sup>q</sup> See the judgment of Sir W. Grant in *Mitford v. Mitford*, 9 Ves. 98.

during their joint lives, and forfeitable if he be outlawed or attainted.<sup>r</sup> When the husband takes these terms for years by survivorship, they are his by the right of marriage, and not as his wife's administrator.<sup>s</sup> However, if the wife be joint tenant of a chattel real and die, the husband shall not have this interest by survivorship, but it will survive to the other joint tenant, because the survivor of the joint tenants is the elder title, and shall prevail.<sup>t</sup> And if the husband grant part of the term which he has in right of his wife, this will not destroy her right of survivorship altogether, for if the husband die, she shall have the remainder.<sup>u</sup> But the husband has no right or interest in the term of his wife, unless he has the possession of it in her right during the coverture; for if a woman be possessed of a term for years, and be dispossessed thereof, and then take husband and die, this right is not given to the husband by the intermarriage, but the personal representatives of the wife shall have it.<sup>v</sup> The wife's estates by Statute Merchant, Statute Staple, and Elegit, are governed by the same rules as to the respective rights of husband and wife over them, as her other chattels real.<sup>w</sup>

Chattels  
real accru-  
ing to the  
wife during  
marriage  
belong to  
the hus-  
band con-  
ditionally

Husband  
has a quali-  
fied interest  
in wife's  
rents.

The husband has the same interest in all chattels real, which devolve on the wife during the coverture.

The husband is also entitled to all rents and arrears of rents due in right of his wife, and he has the same interest in them, namely, a qualified one, which he has in her terms for years. Arrears of rent are chattels real of a mixt nature, being partly in possession, and partly in action; and if the husband survive his wife, he, and not her representatives, shall have all those arrears which became due during the marriage in her right, by survivorship, and, if she survive her husband, she shall have them, and not the executors of the husband.<sup>x</sup> And, if the husband survive the wife, he shall have not only the arrears of rent in-

<sup>r</sup> Co. Litt. 351 a.

<sup>s</sup> 1 Rol. Ab. 345.

<sup>t</sup> Co. Lit. 185 b.

<sup>u</sup> Sym's case, Cro. Eliz. 33.

<sup>v</sup> Co. Lit. 351 a.

<sup>w</sup> Ibid.

<sup>x</sup> Co. Lit. 152 b. 361 a. b.



curring during the marriage, but those which were due before it.<sup>y</sup> At the common law, the husband had no remedy, after the decease of his wife, for the arrears of rent due before the marriage, for the personal representatives of the wife were entitled to them ; but by the 22 Hen. 6. cap. 25. an action of debt or a power of distress is given to the husband, after the decease of the wife, and to his executors and administrators, for the recovery of rents, to which he was entitled in right of his wife, and which were behind or unpaid "in the wife's life." And the construction put on the statute was, that the husband should have all the arrears, as well due before the marriage as after. It was contended that the act gives the husband the arrears "due in his said wife's life," so that they ought to incur, when she was a wife, and not before ; but it was unanimously resolved, that the husband should have the whole arrears due before and after marriage, for that the statute in naming the woman (wife) intended only to design and describe the condition of the woman, and not to imply that the arrears should incur after the coverture.<sup>z</sup>

Since the statute of the 31 Ed. 3. cap. 11., by which it is enacted, that "in case where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods," it has been held that administration of the wife's goods belongs of right to the husband.<sup>a</sup> And as by the statute of distributions,<sup>b</sup> it is provided, that "nothing contained in it shall be construed to extend to the estates of *femes covert*, that shall die intestate, but that their husbands may demand and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of this act," it follows, that the husband is now entitled for his own benefit to all the chattels real of his deceased wife, and to all things in action, trusts, and every other species of personal property, whether

Husband's right to wife's personality after her decease.

<sup>y</sup> Co Lit. 351 b. Ognell's case, 4 Rep. 51.

<sup>z</sup> Ognell's case, 4 Rep. 51.

<sup>a</sup> Ognell's case, 4 Rep. 51. Salk. 36.

<sup>b</sup> 29 Car. 2 chap. 3. sec. 21.

actually vested in her and reduced into possession, or contingent, or recoverable only by action or suit.<sup>c</sup> And even if the husband should die after his wife, without having reduced into possession such part of her property as lay in action, or before the happening of any event on which part of her property depended, still it is now settled that the representative of the husband would be as much entitled to this description of the wife's property as to any other.<sup>d</sup> And if administration *de bonis non* of the wife be granted to any third person, he is a trustee for the representative of the husband.<sup>e</sup>

c Co. Lit. 351 a. note, 304.  
d Ibid.

e *Spuib v. Wym*, 1 Peere Williams, 378.

## CHAP. II.

## OF THE LIABILITY OF THE HUSBAND FOR THE DEBTS OF THE WIFE, CONTRACTED PREVIOUS TO THE MARRIAGE.

THE rule of our law throws upon the husband the burthen of his wife's debts, which were incurred while she was sole, and makes him liable for them at any time during the continuance of the marriage.<sup>a</sup> And the reason assigned for this liability is, that as he is entitled to the rents and profits of her real estate during the coverture, and to the absolute dominion over her personal property in possession, it is but reasonable that he should discharge all obligations entered into by her before the marriage; as otherwise her creditors might lose their just debts.<sup>b</sup> This rule is confined to the wife's engagements, contracted while she was unmarried; for if they were made during a former marriage, her subsequent husband cannot be responsible for them, as she was, at that time, incapable of entering into any contract.<sup>c</sup> This responsibility of the husband for the debts of his wife, contracted while she was a *feme sole*, continues only so long as the marriage, for if she die before the demand has been recovered from her husband, he is discharged from any further liability.<sup>d</sup> And if he die before the recovery of the debt, she alone, and not his representatives, will be liable.<sup>e</sup> It will be sufficient, however, to have had judgment against the husband in the lifetime of the wife for her debt *dum sola*, though execution should not have issued upon it, for the judgment has made the debt his.<sup>f</sup> As in *O'Brian v. Ram*,<sup>g</sup> where judgment was obtained against a *feme sole*; she marries, then the plain-

Husband  
liable for  
debts of  
wife con-  
tracted  
*dum sola*.

Not liable  
for debts  
contracted  
by her dur-  
ing a for-  
mer mar-  
riage.

a 1 Rol. Ab. 351.

b 1 Bac. 292.

c 15 East, 607. 3 Camp. 438.

d 1 Rol. Ab. 351.

e Woodman v. Chapman, 1 Camp. 189.

f Eyres v. Coward, 1 Sid. 337.

g Carthew, 30.

tiff sues a *scire facias* against husband and wife, and has a judgment *quod habeat executionem* against both. Then the wife dies, and the plaintiff sue out a *scire facias* against the husband, and has judgment *quod habeat executionem* against him, and resolved to be well on a writ of error out of Ireland.

It was formerly held that the husband was chargeable in equity after the death of his wife for her debts to the extent of the personal fortune he had received with her, as in *Freeman v. Goodhill*,<sup>h</sup> where the wife, when sole, bought goods for money, and after married and died. The goods came to the husband's hands after her death, but the debt remained unpaid. The bill by the plaintiff, the creditor, was to discover the goods, and a demurrer thereto, which was disallowed by the Lord Chancellor (Nottingham,) who with some earnestness said, he would change the law in that point. But Lord Chancellor Parker overruled this case, for he dismissed a bill with costs, so far as it sought to render the husband liable to the bond of his wife *dum sola*, on the ground that he had had a large fortune with her; his Lordship observing, "that the husband during the coverture is answerable for his wife's debts; and as, perhaps, this may be hard when he has nothing with her, so you are to set against such hardship, that if the husband has received a personal estate with his wife, and happens not to be sued during the coverture, he is not liable. But it is to be considered, that the husband, during the coverture, is to answer for the whole debts of the wife, though he had nothing with her; whereas an executor or administrator is responsible only so far as he has assets."<sup>i</sup> This decision was followed by Lord Chancellor Talbot, in the case of *Heard et Ux. v. Stamford*.<sup>k</sup> The case was this :—A *feme sole* was indebted to her sister in 50*l.* by note; she married, and brought a personal

Husband liable to his wife's debts only during marriage; not after it, even where he has had a fortune with her sufficient to answer those demands.

<sup>h</sup> 1 Cas. in Chan. 295. See also Ball v. Smith, 2 Freeman 281.

<sup>i</sup> Earl Thomond v. Earl Suffolk, 1 P. Wms. 470.

<sup>k</sup> 3 P. Wms. 409. Talbot's Cases, 173.

estate of 700*l.* to her husband, with whom she lived about a year and a quarter, and then died, no proceedings having been taken during the marriage for the recovery of the amount of the note. The husband, on the wife's death, administered to her. The sister married, and, with her husband, brought a bill against the defendant, and finding that the choses in action, of which the wife died possessed, were not sufficient to pay the 50*l.* debt, it was prayed that the defendant, the husband, for so much as he had received out of the clear personal estate of the wife upon his marriage, should be made liable to answer the plaintiff's demand. The Lord Chancellor said, "It is extremely clear, that by law the husband is liable to the wife's debts only during the coverture, unless the creditor recovers judgment against him in the wife's lifetime, and I do not see how any thing less than an act of parliament can alter the law. The wife's choses in action are assets, and will be liable; but these, it seems, are not sufficient in the principal case to answer the demand. If I relieve against the husband, because he had sufficient with his wife wherewith to satisfy the demand in question, by the same reason, where a feme indebted *dum sola* afterwards marries, bringing no fortune to her husband, and judgment is recovered against the husband, after which the wife dies, I ought to grant relief to the husband against such judgment, which yet is not in my power; consequently there can be no ground for a Court to interpose in the present case." And Lord Redesdale, adverting to this case, observes,<sup>1</sup> "The debt of the wife before coverture shall not be recovered against the husband after coverture, because he is answerable for it only in virtue of the duty imposed on him to discharge all the obligations of the wife. This, in some cases, is a little against conscience; but then, in other cases, the charging the husband would be against conscience also; and such being the rule of law, courts of equity have held, that they could not establish any rule upon the difference, whether

<sup>1</sup> Adair v. Shaw, 1 Schol. & Lefroy, 263.

the husband had or had not received a portion with his wife, that should bind his conscience more in one case than in another. This I take to be the meaning of the case of *Heard v. Stamford*.<sup>m</sup>

Husband liable to wife's debts after her death to the extent of the assets which he takes as her personal representative.

It is to be remarked, however, that though the husband is not answerable as such after the death of his wife for debts contracted by her *dum sola*, in consideration of any personal fortune he has received with her, yet he may be liable as her personal representative; for, if there be any of her choses in action, which he had not reduced into possession during her lifetime, they are assets in the husband's hands as her administrator, and he will be liable for these debts to the extent of such property.<sup>n</sup>

Husband liable during coverture for devastavit by wife *dum sola*.

But the liability of the husband, during the coverture, is not confined to the debts of the wife, *dum sola*, arising from her contracts; it extends to the debts she incurs before marriage, as executrix or administratrix, by her mismanagement of the property of the deceased. He is liable for a devastavit committed by her *dum sola*, that is, whatever assets came to her hands as the personal representative of a deceased person, and were wasted by her previous to the coverture, the husband is chargeable with as for her debt during the coverture.<sup>o</sup> And if judgment be had against husband and wife for a devastavit by the wife as executrix *dum sola*, and she die before execution issues, it may be executed against the husband after her death.<sup>p</sup>

Husband liable after coverture for devastavit by wife *dum sola*, to the extent of testator's assets in husband's hands during marriage.

The husband is also liable *after the coverture* for waste committed by his wife *dum sola*, to the extent of the testator's assets which came to his hands during the marriage. As in *Batchelor v. Bean*,<sup>q</sup> where a bill was brought by an heir for an account of his father's personal estate, and to have it applied in exoneration of the real estate, and was brought against the second husband,

<sup>m</sup> 3 P. Wms. 409. Cas. temp. Talbot, 173.

<sup>n</sup> *Heard v. Stamford*, 3 P. Wms. 409. *Adair v. Shaw*, 1 Sch. & Lef. 263.

<sup>o</sup> See *Ld. Redesdale's* observations on *Saunderson v. Crouch* in *Adair v. Shaw*, 1 Sch. & Lef. 267.

<sup>p</sup> *Eyre v. Coward*, 1 Sid. 337.

<sup>q</sup> 2 Raiths Vern. 61.

who married the widow and executrix of plaintiff's father. Upon exceptions to the master's report, the court declared that the husband should be answerable for *so much* of the former husband's personal estate as his executrix had ; and that, although he took it as a portion with the widow, and this in favour of the heir, though there were no creditors concerned in the case ' *Sanderson v. Crouch* ' is nearly to the same effect. There, on exceptions to the master's report, it appeared that a man married an administratrix, who, *before* their intermarriage, had wasted great part of the estate ; after their intermarriage a decree is had against them for a distribution of the assets ; then the wife dies. The court held, " the husband is not to be charged farther than what was possessed or came to his or his wife's hands after their intermarriage." Lord Redesdale's observation on this case this : " Now, this shows clearly, that the understanding of the Court was this :—with respect to what came to the wife's hands, and was wasted by her previous to the marriage, the husband was chargeable, as for her debt during the coverture, but not chargeable after her death ; but for what came to his or his wife's hands, after the marriage, he was chargeable in respect to his possession of it ; for the wasting after the marriage must have been the act of the husband ; it could only be converted to the use of the husband, and therefore, though in that case the husband was not liable at law in an action in the nature of a *devastavit*, yet he was held liable in equity." *Powell v. Bell*,<sup>r</sup> is another decision on the liability of the husband, after the coverture, for waste committed by the wife in respect of assets of the testator, which had come to the husband's or his wife's hands during the marriage. In this case, the defendant had married an administratrix to her former husband, to a share of whose personal estate the plaintiff was entitled. The administratrix wasted a great part of

Husband liable during coverture to waste done by wife before it. Not liable after her death, unless the waste were committed during the marriage.

<sup>r</sup> See Mr. Raithby's note to this case, 2 Vern. 61.

<sup>s</sup> 2 Raith. Vern. 118. Eq. Cas. Ab. 60.

<sup>t</sup> Adair v. Shaw, 1 Schol. & Lef. 267.

<sup>u</sup> Prec. in Chan. 255. Eq. Cas. Ab. 30.

the property before her second marriage, and after this marriage, died. This bill was brought against her husband, to have an account of the estate, and a satisfaction for plaintiff's share ; and it was decreed at the Rolls, that an account should be taken of how much of the estate had come to the hands of the administratrix, before her second marriage ; and also what had come to her or her husband since the marriage ; and plaintiff to have satisfaction against the husband absolutely, for so far as came to his or his wife's hands after the marriage ; and for what came to her hands before the second marriage, to have a satisfaction against the husband so far as he had any estate of his wife's. And this decree was affirmed on appeal to the Lord Keeper. That part of the decree which gives satisfaction against the husband, so far as he had any estate of his wife's, must be understood to mean, so far as he had any estate in character of administrator of his wife.<sup>v</sup> And it must be taken with this further qualification, that if the husband had made himself a purchaser of his wife's choses in action, by his settlement before marriage, he should not be liable in respect to those received after her death, in character of her representative, unless he had knowledge of the *devastavit*.<sup>w</sup> But, if a man marry a woman, the executrix of a former husband, and make a settlement upon her, in consideration of a sum of money, which the articles state to be part of her first husband's fortune, upon an account open and unliquidated, he comes in as a purchaser thereof, subject and liable to that account ; and if it shall turn out subsequently, that the wife was entitled to a less sum, he shall be obliged to refund the difference to the person entitled under the will, notwithstanding his purchase by settlement.<sup>x</sup> This decree was pronounced by Lord Chancellor Cooper, on an appeal from Lord Harcourt, expressly on the ground that the husband had notice that

<sup>v</sup> See *Ld. Redesdale's* observation on this subject in *Adair v. Shaw*, 1 Schol. & Lef. 270.

<sup>w</sup> See the marginal note to *Powell v. Bell*, Prec. Chan. 255.

<sup>x</sup> *Paget v. Hoskins*, Prec. Chan. 431.



the sum he was entitled to in right of his wife, was not a stated liquidated sum, but so much as, upon the account, might be coming to her. In *Upwell v. Halsey*,<sup>y</sup> A. gave personal property to his wife for life, remainder to his sister, and appointed his wife executrix. The wife married the defendant, and died. It was decreed that the defendant should account for what came into his hands. There the wife was entitled during her life; and she having possessed the property, and retained the surplus in her hands, as executrix, was a trustee, to pay herself the interest during her life, and to preserve the principal for her sister. The husband was decreed to account for so much as came to his hands, but was not made accountable for what she might have wasted before the marriage. *Sturt v. Harvey*,<sup>z</sup> establishes the same principle. There the defendant had married the mother of Mrs. *Sturt*. Mr. *Sturt* got a large fortune with his wife, and filed a bill to obtain different properties out of the hands of *Harvey*. Part of the decree was, that *Harvey* should account for such part of the personal estate of his wife's former husband, as had come to the hands of his wife before her marriage with him, or to his or his wife's hands since; and that he should be answerable for what had come to their, or either of their hands, since the marriage; and for what had come to his wife's hands before, that he should be answerable out of her assets, if he admitted any, if not, that an account should be taken of them.

The responsibility of the husband for the DEBTS of his wife is limited, as has been already stated, to those contracted by her *dum sola*; but his responsibility for waste by her as executrix may be extended not only to that committed by her while she was sole, but even to that which was committed by her and a former husband. *Norton v. Sprigg*<sup>a</sup> supports this position. There, upon arguing exceptions to the master's report, the question was, how far the se-

<sup>y</sup> 1 P. Wms. 651.

<sup>a</sup> 1 Vern. 309. Eq. Ca. Ab. 60. pl.

<sup>z</sup> Cited by Ld. Redesdale in *Shaw* 4.

<sup>v</sup>. *Adair*, 1 Schol. & Lef. 271.

Second husband liable for devastavit by his wife and her former husband.

cond husband should be charged of his own estate for a devastavit and breach of trust committed by the feme and her first husband. Per Curiam. "Where there is a bond, there is a lien by deed, and so the second husband bound; but where there is barely a breach of trust or debt by simple contract, then in equity the plaintiff ought to follow the estate of the wife in the hands of the executor of the first husband." This judgment is not very intelligible; but Lord Redesdale has removed all difficulty in it by the following explanation. His Lordship said, <sup>b</sup> "It was conceived that the second husband should be relieved out of the assets of the first husband; that is, if the first husband possessed himself of the assets of the testator, the second husband, who was chargeable with the debts of the wife, was entitled to be relieved out of the assets of the first husband, that first husband having possessed himself of that which was not given to him by the marriage, and of which he had no other right to possess himself, than for the purpose of protecting himself against the demands of the creditors of the testator, a demand which he was liable to as husband of the administratrix. It seems that in that case there was a right in the second husband to redeem, by following the assets of the first husband to recover what had been received by him." This decree must have been in the lifetime of the wife, as otherwise the husband would not have been liable for her debts. But if there be no assets of the first husband, the second husband must pay the demand as the debt of the wife. In *Gilpin v. Smith*,<sup>c</sup> it was held, that a third husband of the executrix of her first husband was liable for the assets of the testator, not only received by him, (the third husband, and by his wife *dum sola*,) but which were received by her second husband. The case was this: Sir Edward Zouch, seised in fee of lands, settled them on trustees after his death for payment of his debts, and dies, leaving the defendant Zouch, his son and heir, an infant, and the defendant dame Dorothy his wi-

<sup>b</sup> Adair v. Shaw, 1 Schol. & Lef. 268.

<sup>c</sup> 1 Chan. Cas. 82. Eq. Cas. Ab. 60.

dow. She entered on the lands, and took the profits ; then she marries Loyd, who took the profits during his life, as she had before. Loyd dies, and the defendant Smith intermarries with dame Dorothy, and she being in receipt of the rents till that time, the defendant Smith continued to receive the profits till defendant Zouch came of age. The plaintiff was a creditor, and his bill was to have his debts paid. This cause was first heard at the Rolls, and it was decreed that the plaintiff's debt should be paid, and both the lands and Smith, in respect of the profits taken by dame Dorothy, Loyd, and himself, should be liable to the payment thereof, with this, that if it fell on the heir to pay the debt, he should have the benefit of the decree, to reimburse him against defendant Smith, so far as the profits taken by dame Dorothy, Loyd her second husband, and Smith, did extend. There was an appeal from this decree to the Lord Chancellor, and upon the whole matter the Court conceived the decree just.

So that the liability of the husband, during the coverture, seems to stand thus : He is liable for all debts contracted by his wife while she was unmarried, though he had no fortune with her ; and if she die before the recovery of such debts, he is not answerable for them, though he should have had a fortune with her. He is also answerable during coverture for waste not only committed by the wife *dum sola*, but for waste committed by her and a former husband, and he is answerable for it even after her death, to the extent of the assets of the wife's testator, which came to his or his wife's hands during the coverture.

Though the husband is liable during coverture for the debts of his wife *dum sola*, yet the action for them must be brought against both, for if brought against the husband only, and a verdict be found for the plaintiff, the judgment will be arrested on this ground.<sup>d</sup> But though it be essential that the wife shall be joined with her husband in an

Remedies  
for debts of  
wife, *dum  
sola*.

<sup>d</sup> Robinson v. Hardy, 1 Keble, 281. Drue v. Thorn, Aleyn, 72.  
Mitchinson v. Hewson 7 T. R. 348.

action for a debt contracted by her before the marriage, yet if a promise by her, subsequent to the marriage, be alleged in the declaration, it will be error, and the judgment may be reversed.<sup>e</sup> And the reason of the decision is this, that a married woman cannot make any contract, or give a promise, expressed or implied. If, however, the action be commenced against a woman whilst sole, and she marry after judgment had against her, the execution must issue against her alone.<sup>f</sup>

Husband  
liable for  
debts of  
wife *de jure*  
only.

When it is said that the husband is liable for the debts of his wife, contracted *dum sola*, it must be understood of a wife *de jure*; for where assumpsit was brought against husband and wife for goods sold to the wife previous to her marriage with defendant, it was proved that her first husband was alive at the time of the delivery of the goods and of the trial, and that she had married defendant on the supposition of first husband being dead; and plaintiff was nonsuited by Lord Ellenborough, on the ground, that if she had a husband alive when the goods were delivered, she was incapable of entering into any contract.<sup>g</sup>

<sup>e</sup> Morris and Wife v. Norfolk and another, 1 Taunt. 212.

<sup>f</sup> 3 Black. 414. Doyley v. White, Cro. Jac. 323. Buller, N. P. 23. S. C.

<sup>g</sup> Cowley v. Robertson and Wife, 3 Camp. 438.

### CHAP. III.

OF THE LIABILITY OF THE HUSBAND FOR THE DEBTS OF HIS WIFE, CONTRACTED DURING THE MARRIAGE, AND OF THE NECESSARIES WITH WHICH HE IS BOUND TO SUPPLY HER.

EVERY man is obliged by the common law of England to supply his wife with necessaries, such as meat, drink, clothes, medicine, &c. &c. suitable to his degree and circumstances; and if he will not do so, the law affords a remedy. For upon a *supplicavit* to the Chancellor by the wife, the husband will not only be bound to keep the peace towards her, but to supply her necessities; and if she be deprived of her clothes, or refused the necessary sustenance, the Spiritual Court will divorce her from him, and give her alimony for her support.<sup>a</sup> But the wife, having these modes of redress, cannot make her husband liable for debts contracted by her, even for necessaries, without his consent: he must be a party to that contract by his agreement, either expressed or implied, or he shall not be bound by it. And therefore it is, that in an action against the husband for necessaries furnished to his wife, it is always a question left to the jury to determine, whether he has given his assent or not. The contract of a married woman is absolutely void, it binds neither herself nor her husband without his assent; but where she buys necessaries for herself or her family, the husband's assent will always be presumed during cohabitation, unless evidence be given to rebut the presumption arising from the circumstance of their living together.<sup>b</sup> And this presumption will not be

Husband liable for necessaries for his wife.

Not liable for her debts contracted without his assent.

Husband's assent presumed, when wife buys necessaries for herself and family.

<sup>a</sup> Manby v. Scott, 1 Sid. 109. 1 Bac. Ab. 296.

<sup>b</sup> Langford v. Tiler, 1 Salk. 113. Etherington v. Parrot, 1 Salk. 118.

rebutted by the profligacy of her conduct during cohabitation.<sup>c</sup>

Husband's implied assent disproved by evidence of his positive orders that wife should not be trusted.

But this implied assent will be disproved by evidence that a positive order was given by the husband, that his wife should not be trusted by the person seeking to charge him. This was the case of *Etherington v. Parrot*,<sup>d</sup> where *assumpsit* was brought against the defendant for goods sold and delivered to his wife. It appeared that the goods were bought by the defendant's wife to make her clothes, and that she and defendant cohabited, but that she was an extravagant woman, and that on a former occasion, when she had bought goods from the plaintiff, the defendant paid for them, and at the same time gave notice to the plaintiff's servant, who received the money, that his master should trust her no more. On this occasion Lord Holt held, that "cohabitation is an evidence of the husband's assent to contracts made by his wife for necessaries. But if the husband have solemnly declared his dissent, that she shall not be trusted, any person that has notice of this dissent trusts her at his peril after, for the husband is only liable on account of his own assent to the contracts of his wife, of which assent cohabitation causes a presumption. For the wife has no power originally to charge her husband, but is absolutely under his power and government, and must be content with what he provides, and if he does not provide her with necessaries, her remedy is in the Spiritual Court." And therefore the plaintiff was nonsuited.

But though a caution to particular individuals during cohabitation not to give credit to his wife will protect the husband against actions brought by these persons against him for necessaries subsequently furnished to her, yet a general notice to the public in the Gazette or newspapers, not to give her credit, will afford no protection to him, unless he can show that the persons suing had notice of the advertisement.<sup>e</sup>

<sup>c</sup> Robinson v. Greinold, 1 Salk. 119. 4 Vin. 175.

<sup>d</sup> 1 Salk. 118. 2 Ld. Raym. 1006.  
<sup>e</sup> 1 Bac. Ab. 295. tit. Bar. and Feme.

The presumption that the contract was made with the assent of the husband will also be repelled by evidence that the credit was given to the wife and not to the husband. As in *Metcalf v. Shaw*,<sup>f</sup> which was an action on a promissory note, and for goods sold. The plaintiff, a milliner, supplied articles of dress to the wife of the defendant, who was an apothecary in a small country town, in the course of six months, to nearly 200l. The defendant and his wife were then living together, but there was no evidence that he was at all aware of her dealings with the plaintiff. A former account which she had had with plaintiff, without her husband's knowledge, had been paid by her father, who desired that no farther credit should be given to her without her husband's sanction. The goods in question were ordered by her alone, and the plaintiff took the promissory note declared on for the amount in her own name. It was contended for the plaintiff, that although the defendant might not be liable on the note, or for the whole of the goods, there must be a verdict for such part of them as the jury should think suitable to his circumstances and degree. That the notice, not coming from him, but from another, was of no avail, and he had not proved that she was furnished with proper apparel from any other quarter. Lord Ellenborough said, "The action clearly cannot be maintained on the note, as the wife had no authority to make it; and he is not liable for any part of the goods on this plain ground, that they were not supplied on his credit, and the plaintiff looked to the wife only for payment. The credit was given to the wife only, and not to the husband." The verdict was accordingly for the defendant.

Husband's assent disproved by evidence, that the credit was given to the wife.

The same rule was acted on in the case of *Bently v. Griffin*.<sup>g</sup> This was an action for dresses sold to the defendant's wife. It appeared on the trial, that the defendant was an attorney, very limited in practice and income; that the plaintiffs had, in about a year and a half, furnished his wife with articles of fashionable dress to the amount of

Husband not liable, where credit given to the wife.

<sup>f</sup> 3 Campb. 22.

<sup>g</sup> 5 Taunt. 356.

1831., and that the charges were reasonable. It was also proved that the plaintiffs had debited the wife in their books, that they had been partly paid, by three bills of exchange, drawn by them on the husband, which were accepted and paid by her; but there was no proof that these bills had ever been presented to him for acceptance. It was also proved that defendant and his wife cohabited and that she had worn, in his presence, some of the articles furnished. On the part of the defendant it was proved, that when some of the articles were sent home, she desired the servant to put them away, that her husband might not see them; and that in the presence of the defendant and one of the plaintiffs, she had said, "her husband never paid her bills, she always paid her own:" and also, that when one of the bills which had been drawn on her husband, and accepted by herself, was dishonoured, the plaintiffs had written in urgent terms to the wife, praying her to provide for the bill, but had made no application to the husband. Justice Heath, who tried the case, left it strongly to the jury to consider whether the credit had not been given to the wife, and not to the husband; but the jury found a verdict for the plaintiffs. The verdict was afterwards set aside, the Court being of opinion that the credit was given to the wife, and that the husband was not liable. On the same principle it was decided in the Exchequer Chamber, on a writ of error to reverse a judgment of the King's Bench, that assumpsit against the husband for money lent to the wife, at the request of the wife, was not maintainable; because it appeared on the record that the contract was with the wife, and not with the husband.<sup>h</sup> But if the money be alleged in the declaration to have been lent to the wife, at the express request of the husband, then the action is maintainable; because the money being lent to the wife at the husband's desire, is money lent to himself.<sup>i</sup> However, if the wife carry on a trade alone, in her own name, the husband living with her, he will be liable for

<sup>h</sup> Stone v. Macnair, in Error, 7 Taunt. 432. 4 Price, 48.      <sup>i</sup> Stephenson v. Hardy, 3 Wilson, 388.



goods sold to her for this business, with his knowledge, although the invoice and receipts were in the name of the wife, and although the landlord received the rent of the house from the wife, and she was rated to and paid the poor's and paving rates; and though the husband never interfered in the payment or receipt of money.]

If the husband be not separated from his wife, but be occasionally absent in the discharge of his professional duties, he will not be liable for necessaries furnished to her, where he allowed her an adequate sum for that purpose; and had also given notice of the allowance to the person who provided the necessaries. In *Holt v. Brien*,<sup>1</sup> it appeared that the defendant was a surgeon of a ship of war, and that his wife and four children lived at Plymouth, whilst he was absent at sea; that during his absence on such duty, the plaintiff had supplied meat to the defendant's wife, and that previous to his having so supplied her, the plaintiff had been distinctly informed, that the defendant allowed his wife 100*l.* per annum, and that if plaintiff trusted her, defendant would not pay him. It was, also proved, that the allowance had been punctually paid. The learned judge told the jury that as there was no proof of any separation between defendant and his wife, nor any separate maintenance settled on her by deed, the defendant must be considered as liable for all debts contracted by his wife for the necessary support of herself and her children: and the jury found for the plaintiff. But the Court of King's Bench afterwards set aside this verdict, on the ground that the case had not been properly left to the jury. And the Court stated this to be the law as applicable to this case: that if a man supplies his wife with a sufficient allowance for the purpose of paying for those necessary supplies, and the tradesman with whom she deals has notice of it, and afterwards trusts her, he does so at his own peril, and will only be entitled to recover by proving that, in fact, the allowance was not regularly paid.

Husband not liable for necessaries for wife furnished during his absence from home, when he allows money for the purpose, and has given notice to the person providing them.

<sup>1</sup> *Petty v. Anderson*, 3 King. 170.

<sup>2</sup> 4 B. & A. 252.

Husband  
not liable  
for neces-  
saries ille-  
gally sup-  
plied to his  
wife.

So, where the necessaries are furnished to the wife, under circumstances which render it illegal to have so furnished them, the husband will not be liable. As where Lady Dinely was in execution for a conspiracy to charge her husband, Sir John, with subornation of perjury, the plaintiff, the keeper of a sponging-house within the rules, received her into his house, and found her necessaries, for which this action was brought; the Chief Justice ruled that it would not lie, for her being there was illegal; she being such a prisoner as was not entitled to the benefit of the rules.<sup>1</sup>

Husband  
liable for  
necessaries  
furnished  
to wife dur-  
ing separa-  
tion.

The husband is liable for necessaries furnished to his wife while they live apart, as well as while they cohabit, and his assent will be presumed, unless the contrary appears. If husband and wife separate and live apart by mutual agreement, he is still answerable for necessaries supplied to her, subject however to the same exceptions which govern his liability during cohabitation; that is, if the goods be furnished notwithstanding his express directions that no goods shall be given to her, or if the credit be given to her alone and not the husband; in either case he is discharged from responsibility.

Husband  
liable for  
necessaries  
when he  
turns his  
wife out of  
doors.  
though he  
should give  
notice not  
to trust her.

The husband is also liable for necessaries for his wife, when the separation is involuntary on her part, as when he turns her out of doors without good cause, and then he is liable notwithstanding his express directions to individuals that she shall not be supplied. For by causelessly sending her from his house, he gives her a general credit for necessaries, for which he will be answerable. And such is stated to be the law in several cases.<sup>m</sup> It was so decided directly in the case, of *Bolton v. Prentice*.<sup>n</sup> In this case, it appeared that the defendant left his wife and went into other lodgings, and, when she followed him and found him out, he refused to admit her, and struck her, and declared he would not maintain her, or pay any one that did. In this distress she

<sup>1</sup> Fowles v. Sir John Dinely, 2 Strange. 1122.  
<sup>m</sup> Etherington v. Parrot, 1 Salk.

118. 2 Ld. Raym. 1006. Langworthy v. Hockmore, cited in Todd v. Stokes, 1 Ld. Raym. 444.  
<sup>n</sup> 2 Strange, 1214.

borrowed clothes of her friends, and applied to the plaintiff, who furnished her with necessaries according to the defendant's degree, which the defendant refusing to pay for, the present action was brought, and the jury found a verdict for the plaintiff. Upon a motion for a new trial, the Court held the verdict was right. So, in *Thompson v. Hersey*,<sup>o</sup> the defendant shut his doors against his wife, and she was obliged to procure lodging and maintenance from the plaintiff, for which this action was brought. A verdict was found for the plaintiff, and on a motion to set it aside, the Court unanimously refused the motion, saying that the wife had no maintenance from her husband, nor admittance into his house, and that she was obliged to procure lodgings and maintenance somewhere else; and he was held to be liable under these circumstances. In like manner, Lord Ellenborough ruled at *Nisi Prius*, that where a man turns his wife out of his house with circumstances of violence, he was liable to the attorney who prepared articles of the peace against him, as she carried with her credit for whatever her preservation and safety required.

And though the husband, having turned his wife out of doors, should caution the public in the newspapers, and even individuals, not to trust her, still he will be liable; as Lord Kenyon ruled it in *Harris v. Morris*,<sup>a</sup> his Lordship saying, that "if he put her out of doors, though he advertise her, and caution all persons not to trust her, or, if he even gave particular notice to individuals not to give her credit, still he would be liable for necessaries furnished to her, for the law has said, that where a man turns his wife out of doors, he sends with her credit for her reasonable expenses." And if the wife have even eloped, and afterwards solicit to return to her husband, he is liable, provided the elopement was not adulterous, because this is tantamount to a turning her out of doors. For Lord

Husband liable for necessaries furnished to his wife, even if she have eloped, if the elopement be not adulterous, and she solicits to return.

<sup>o</sup> 4 Bur. 2177.

<sup>p</sup> *Shepherd v. Mackoul*, 3 Camp.

<sup>326.</sup> *Williams v. Fowler*, 1 M'L. & Younge, 269.

<sup>q</sup> 4 Esp. Cas. at N. P. 41.

Elton held, that if a man will not receive his wife into his house, he turns her out of doors.<sup>r</sup>

Husband  
liable for  
necessaries  
supplied to  
his wife,  
when he  
treats her  
so cruelly  
as to ren-  
der her de-  
parture  
from his  
house re-  
quisite.

And not only the turning the wife out of doors will render the husband liable for necessaries for her, but if he treat her so ill as to render her departure indispensable, he must maintain her. Lord Kenyon said, that where a wife's situation in her husband's house was rendered unsafe from his cruelty or ill treatment, he should rule it equivalent to a turning her out of the house, and that the husband should be liable for necessaries furnished to her under these circumstances.<sup>s</sup> But the ill treatment which would justify this abandonment of her husband's house, and give a credit to her for necessaries, must be such as to excite a well-grounded apprehension for her personal safety; not merely such as a fanciful woman may entertain, but such as a jury shall esteem to have been felt upon reasonable grounds.<sup>t</sup> In the case of *Horwood v. Heffer*,<sup>u</sup> an action was brought against the defendant for necessaries furnished to his wife. The counsel having stated that the husband treated his wife with great cruelty, by placing a profligate woman at the head of his table and telling his wife, that if she did not like to dine there, she might dine in her own chamber; also by confining her to her room, under pretence of her insanity, from which she escaped, and contracted the debts sought to be recovered; the Judge (Lawrence) nonsuited the plaintiff; and on a motion to set it aside, the rule was refused, Chief Justice Mansfield saying, "If this suit was maintainable, it would be necessary that the jury should, in the first place, determine whether the wife lawfully left her home or not. This would wholly supersede the necessity of a suit for alimony, or a divorce *a mensa et thoro* I think nothing short of actual terror and violence will support this action." This case was decided

<sup>r</sup> Rawlins v. Vandyke, 3 Esp. N. P. C. 250.

<sup>s</sup> Hodges v. Hodges, 1 Esp. N. P. C. 441.

<sup>t</sup> 3 Bing. 127.

<sup>u</sup> 3 Taunt. 431.

on the ground that the conduct of the husband, in putting an abandoned woman at the head of his table, was not sufficient to justify his wife in leaving his house, as it did not amount to actual force, nor was calculated to inspire reasonable apprehension of it, and as she might have had necessaries, if she had remained at home. However, it was ruled otherwise in *Aldis v. Chapman*,<sup>v</sup> where it was held, that a husband rendered his house an unfit residence for his wife, by bringing a woman of bad character under his roof; and that when the wife, in consequence of such conduct, went away and lived apart from him, he was bound to provide her with necessaries, i. e. medicines in sickness during the separation. And in the subsequent case of *Houlston v. Smyth*,<sup>w</sup> Chief Justice Best held not only that a woman was not bound to wait till actual violence is committed, and that, if there be a reasonable ground for apprehension, she may fly from her husband; but also said, that the doctrine in *Horwood v. Heffer*,<sup>x</sup> that a woman was not justified in leaving her husband's house when he placed a profligate woman at his table, could not be law. In this case of *Houlston v. Smyth*, the wife, though perfectly sane, had been confined in a madhouse, and, having escaped from it, she returned to her husband, who struck her in the face, threatened her with a pistol, and with another confinement in the madhouse. She then fled to the plaintiff, who supplied her with the necessaries for which an action was brought, and a verdict found for the plaintiff. A motion was afterwards made for a rule for a new trial, on the ground that the judge had misdirected the jury, by telling them, that if they thought the defendant's wife had left his house with reasonable ground for apprehending personal violence, she was entitled to credit for her support; and *Horwood v. Heffer*<sup>y</sup> was relied on. However, the rule was refused, and the authority of this decision was denied. The Chief Justice Best laid down the law thus: "If a

Husband liable for necessaries, when wife leaves his house in consequence of a profligate woman being placed at table with her.

<sup>v</sup> 1 Selw. N. P. 281. 5th edit.  
<sup>w</sup> 3 Bing. 127.

<sup>x</sup> 3 Taunt. 421.  
<sup>y</sup> Ibid.

wife remains in the house with her husband and an adul-  
tress, I doubt whether she could afterwards obtain a divorce  
for the adultery of her husband : her continuance in the  
house with her husband, under such circumstances, might  
be considered as an assent to his conduct, and prejudice  
her case in the spiritual court." Mr. Justice Park said,  
" I am surprised at the language ascribed to the Court in  
*Horwood v. Heffer*, because it is abhorrent from every feel-  
ing of a man and a Christian. It is not to be endured, that  
the mistress of a house should confine herself to a chamber  
with bare necessaries, when a prostitute is setting at the  
same table with her husband. That cannot be the law of  
England, because it is not the law of morality and religion."  
And Mr. Justice Gaselee said, " I have always considered  
the law on this subject to be as laid down by Lord Kenyon ;  
that if a man renders his house unfit for a modest woman  
to continue in it, she is authorized in going away." So that  
it may now be safely stated to be law, that if a husband  
will introduce a woman of profligate habits into his house,  
and place her at his table, his wife will be justified in with-  
drawing herself from his protection, and he will be bound  
to provide her with necessaries.

Not liable  
if he turn  
her out for  
good cause.

However, if the husband turn his wife out of doors for  
good cause, viz. she having committed adultery; he will not  
be liable for necessaries furnished to her subsequent to her  
exclusion."

Not liable,  
if wife com-  
mit adul-  
tery after  
being turn-  
ed out by  
her hus-  
band with-  
out good  
cause.

Or if, after having been turned out of her husband's  
house with out good cause, she commit adultery, he is  
from that moment freed from all liability with respect to her  
subsequent debts As in *Govier v. Handcock*,<sup>a</sup> which was  
an action for the board and lodging of the defendant's wife.  
He having committed adultery with a woman whom he  
brought into his house, treated his wife with great cruelty,  
and finally turned her out of doors. Then the wife com-  
mitted adultery, after which she offered to return home,

<sup>a</sup> *Ham v. Toovey*, Selw. N. P. a 6 T. Rep. 603.  
272. 5th edit.

but her husband would not receive her, and the action was brought for her board and lodging subsequent to that time. Mr. Justice Buller, before whom the cause was tried, was of opinion that the husband was not bound to receive the wife after, and consequently was not bound to support her, and he directed a verdict for the defendant. And on a motion in the King's Bench to set aside the verdict, the rule was refused.

But if the wife, instead of being turned out of doors by her husband, or being obliged to leave him in consequence of ill-treatment, elope<sup>b</sup> from him, he will not be liable for necessities furnished to her after the elopement. In *Manby v. Scott*<sup>c</sup> the wife went away from her husband without his consent, and during the separation he expressly forbid the plaintiff to deliver any goods to his wife; notwithstanding which prohibition, the plaintiff sold silks and velvets to her, and then brought an action for the amount against the husband. The jury found that the goods were suitable to the rank of the husband. The judges of the King's Bench were divided in opinion as to the liability of the husband under these circumstances, whereupon it was adjourned to the Exchequer Chamber, where nine of the judges were of opinion that the husband was not chargeable. It would appear from this case that an express caution was necessary from the husband to tradesmen to exempt him from liability for necessities for his wife, even when she elopes from him without his consent. But the law seems now to be, that if the wife depart from her husband without his consent, he is not liable for necessities supplied to her, although he should not have given any notice not to trust her, and although the tradesman supplying her had no notice of the elopement. And so the law was stated to be by Lord Holt.<sup>d</sup> And the mere elopement without any act of adultery will be sufficient to discharge the husband, as it was

If wife elope, husband not liable for necessities. If she elope, not adulterously, and offer to return, husband liable.

<sup>b</sup> As to the meaning of the word *elope*, see 3 Esp. N. C. 256. 2 Black. Rep. 1080.

<sup>c</sup> Sid. 109. 1 Lev. 4. 1 Bac. Ab. 295.

<sup>d</sup> *Lungworthy v. Hockmore*, 1 Ld. Raym. 444.

held by C. J. Raymond,<sup>e</sup> who said that "if a woman elopes from her husband, though she does not go away with an adulterer or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound." If, however, after such an elopement, the wife offer to return, his Lordship seems to have been inclined to think the husband's liability for necessities would have been revived.<sup>f</sup>

If wife elope with an adulterer, husband not liable, though she offer to return.

If husband, knowing his wife's adultery, leave her in his house, he is liable though he separate from her.

But if the elopement of the wife be accompanied with adultery, then the husband is completely discharged,<sup>g</sup> and no subsequent offer by her to return to her husband will restore his liability.<sup>h</sup> All these cases have been decided on this principle, that when the wife elopes from her husband's house and renounces his protection, or when she is turned out for good cause, the evidence of his assent to maintain her ceases. And therefore where the husband, knowing of his wife's adultery, abandoned his house and left her in it, with children bearing his name, but without making any provision for her in consequence of the separation, and the wife continued in a state of adultery, the husband was held to be liable for necessities furnished to her during that period.<sup>i</sup> In this case the Chief Justice told the jury, that if they believed the plaintiff knew the separation was caused by her adultery, they ought to find for the defendant, if not, then for the plaintiff. The verdict was for the plaintiff for 2l. 10s., and on a motion to set it aside, the rule was refused. Here the husband, instead of putting his wife out of his house, on the discovery of her misconduct, left it himself, and suffered her to remain in it, and thus gave a credit to her with those who were ignorant of the cause of separation, her continuance in his house affording evidence of his assent to her contracts for necessities.

If husband take back his wife who had,

In like manner, where the husband had taken back his wife, who had eloped with an adulterer, and afterwards turned her out of doors, he was held to be liable for

<sup>e</sup> Child & al. v. Hardyman, 2 Strange, 875.

<sup>f</sup> See also 1 Lev. 4.

<sup>g</sup> Morris v. Martin, 1 Str. 647.  
<sup>h</sup> Manwaring v. Sands, 1 Str. 706.

<sup>i</sup> Govier v. Handcock, 6 T. R. 603.

<sup>j</sup> Norton v. Fazan, 1 Bos. & Pul. 226.



necessaries supplied to her, notwithstanding her former adultery.<sup>k</sup> In this case Lord Kenyon said, that though an adulterous elopement will prevent the husband from being liable for articles furnished to the wife during the term of her elopement, that is no answer now. The husband has taken her back, and she was from that time entitled to dower. She was *sponte retracta*,<sup>l</sup> and of course entitled to maintenance during coverture, if her husband turned her out of doors.”

eloped with an adulterer, and afterwards turn her out of doors, he is liable.

As the husband is discharged from his liability for necessities for his wife during separation, when she elopes from him, whether in an adulterous manner or not, so he also derives an exemption from such liability, when they have separated by mutual consent, and he has allowed her a sufficient separate maintenance for her support, and has paid the allowance. And separation and separate maintenance are facts which, if proved in an action against the husband for the price of necessities furnished to his wife, will be a bar to a recovery against him. However the separate maintenance operates as a bar, not by taking away any power from the wife of binding her husband by her contracts, for the law allows her no such power, but by affording evidence of that want of assent on the part of the husband, which alone could render the engagement valid.<sup>m</sup> For if a man lives separate from his wife and pays her a separate maintenance, such an allowance must be for the very purpose of providing her with the articles which may be necessary for her, and therefore it negatives the idea of an assent on his part to any engagement for these necessities. *Todd v. Stokes*<sup>n</sup>, establishes this proposition. The action was brought by an apothecary to recover the amount of medicines furnished to the defendant's wife. Non assumpsit was pleaded, and on the trial it was proved, that the defendant and his wife had been separated by consent for five years, and that upon the separation the defendant

Separation and separate maintenance discharge husband from all liability for wife's debts.

<sup>k</sup> *Harris v. Morris*, 4 Esp. N. P. C. 41.  
<sup>l</sup> Co. Lit. 32 b.

<sup>m</sup> 3 Esp. N. P. C. 250.  
<sup>n</sup> 1 Salk. 116.

had signed articles to certain trustees, by which he had obliged himself to allow her 20*l.* per annum, which *he had done accordingly* ever after, and that the plaintiff did not know, when he furnished the defendant's wife with medicines, that she was a married woman. But Lord Chief Justice Holt ruled that the defendant was not bound to pay the plaintiff's bill. That if baron and feme separate by consent, and she has a separate allowance from him, it is unreasonable she should have it still in her power to charge him; and it is not to be presumed but tradesmen who deal with her trust her on her own credit, and not on the credit of her husband, and a personal notice is not necessary: it is sufficient that it be public and commonly known. This is Salkeld's report of this case; but there is another account of it in Lord Raymond<sup>o</sup>, from the judgment in which it would seem that Lord Chief Justice Holt rested the exemption of the husband from the wife's contracts, upon the circumstance of the separation and the notoriety of that fact for five years at the place where the defendant resided, and not upon the separate maintenance. But the report in Salkeld must be the more correct, as the mere separation without the maintenance could never have produced such a decision. Indeed the statement in Lord Raymond of the separate maintenance, and of the regular payment of it, would have been quite unnecessary, if the mere fact of separation and the notoriety of it would have warranted the judgment. *Cragg v. Bowman*<sup>p</sup> recognizes the same doctrine, for there it was held that a separate maintenance *duly paid* to a wife discharges the husband from all liability to her *future* debts; and the same may be inferred from *Thompson v. Harvey*<sup>q</sup>, although the point was not directly decided, for there the husband was held liable to his wife's debts, because it did not appear that she had any separate allowance from him. So in *Hatchet v. Baddely*<sup>r</sup>, and *Lean v. Schutz*<sup>s</sup>, which were actions against married women (the husbands not

<sup>o</sup> 1 Lord Raym. 444  
<sup>p</sup> 6 Mod. 147.  
<sup>q</sup> 4 Burr. 2177.

<sup>r</sup> 2 Black. 1074.  
<sup>s</sup> 2 Black. 1195.

being joined), it was admitted on all sides to be law, that a separate maintenance absolved the husband from the liability to pay for necessities supplied to his wife. But the principal point decided in them was, that no action was maintainable against a married woman unless her husband were joined in it with her. And in *Ringstead v. Lunsborough*<sup>t</sup>, *Barwel v. Brooks*<sup>u</sup>, and *Corbet v. Poelnitz*<sup>v</sup>, where, in contradiction to those cases in 2 Blackstone, it was held that a married woman was separately liable for her own contracts, she having a separate maintenance; still these decisions were pronounced on the very ground that the husband was not liable in consequence of such separate provision. However, *Marshall v. Rutton*<sup>w</sup> has corrected this reasoning, by deciding, that although the husband be discharged from all liability for his wife's contracts by virtue of a separate allowance to her, still that the wife cannot contract for necessities, and therefore cannot be responsible for them. And thus we see, that, under every change which the law of baron and feme has experienced, the operation of a separate maintenance, in effecting an exemption to the husband from the debts of his wife, has continued the same since the time it was first held to produce that effect. From *Tedd v. Stokes* it would appear to be necessary that the fact of separate maintenance should be notorious to discharge the husband, but no subsequent case holds such doctrine. But the mere circumstance of the husband entering into an agreement to allow his wife a separate maintenance will not be sufficient to absolve him from this liability, although that agreement should be by deed, unless in the first place he pays that allowance, and in the second place, unless the allowance be adequate to his circumstances and rank in society. And that the actual payment has been deemed essential, is evident from all the cases cited upon this subject, because wherever a separate maintenance was given in evidence on the trial as a discharge to the husband,

<sup>t</sup> Cited in *Corbet v. Poelnitz*,  
<sup>1</sup> T. Rep. 6.  
<sup>u</sup> Corke's Bankrupt Law, 36.

<sup>v</sup> 1 T. Rep. 6.  
<sup>w</sup> 8 T. Rep. 545.

Husband's liability for wife's necessities discharged by separate allowance only when paid.

payment of it was also proved, and where it has been pleaded in actions instituted against married women for the purpose of making them solely and personally responsible, the pleader has never failed to add an averment that the allowance has been regularly paid, a practice which proves at least the opinion of the bar upon the necessity of such a circumstance. In *Ozard v Dornford*<sup>x</sup>, the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it; in an action for board and lodging of defendant's wife, the jury found for the plaintiff under the directions of Lord Mansfield. And in *Turner v. Winter*<sup>y</sup>, his Lordship nonsuited the plaintiff, because on a separation between husband and wife the husband had agreed to make an allowance to his wife, *and had paid it*, though the plaintiff had no notice of the transaction. And the decision in *Nurse v. Craig*<sup>z</sup>, has confirmed the necessity for the actual payment of a separate allowance, so as to form a defence to an action against the husband for necessities furnished to his wife. The action in this case was assumpsit for meat, drink, &c. &c, supplied to the defendant's wife; and the facts appearing on the trial were, that the defendant and his wife having agreed to separate from each other, a deed of separation was executed in 1803, between the defendant (a tailor, in low circumstances), his wife, and the plaintiff, sister to the defendant's wife, by which the defendant covenanted with the plaintiff, and agreed with his wife that he would permit her to live apart from him as a single woman, and would suffer her to enjoy all the effects then in her possession, or which she might thereafter acquire, notwithstanding her coverture, and assigned the same to the plaintiff, as her trustee, and made the plaintiff his attorney, to sue for the same in trust for his wife: and further covenanted with the plaintiff, that he would pay to his wife, or to such person as she should appoint, for and towards her maintenance, an annuity of 13*l.*, at the rate of 5*s.* per week, during her life, for all such time as she should live separate

x 1 Selw. N. P. 279. 5 edit.  
y 1 Selw. 280. 5. edit.

z 2 New Rep. 148.

and a part from him ; which she agreed to accept, in full satisfaction, for her support, maintenance, and alimony, provided that if the defendant should pay any debt which his wife, during such separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the said weekly sum, until he should be reimbursed. It was proved that the defendant's wife, after this separation had taken place, went to live with the plaintiff, her sister, and was furnished by her with the necessaries for which the action was brought ; and that the defendant, having for some time failed in payment of the weekly allowance stipulated for by the deed, the action was commenced to recover from him the amount of what had been furnished to his wife. The deed of separation having been produced at the trial, Sir James Mansfield was of opinion that the plaintiff, who was the trustee in that deed, could not maintain the action, framed as it was, and accordingly nonsuited the plaintiff. A conditional rule having been granted for setting aside this nonsuit, it was stated, on showing cause against this rule, that the question was, whether an action of assumpsit upon an implied contract could be maintained by the present plaintiff, who was a trustee in the deed by which the separate maintenance was secured to the defendant's wife. For the defendant, it was contended, that the case of *Todd v. Stokes*<sup>a</sup> governed the present, that the plaintiff had notice of the separation, she being the trustee whose duty it was to enforce payment of the allowance to the wife, which was secured to her at the time of the separation. Besides, that the court should not furnish the plaintiff with a remedy upon an action of assumpsit, when she has already an action of covenant on the deed in her own power. That such a decision would be liable to the hardship and the inconvenience that the plaintiff, after recovering the amount of her debt, might still sue the defendant upon the covenant, and so the defendant would be charged by his wife beyond the allowance secured at the time of the separation. For the plaintiff it was argued, that '*Todd v. Stokes*' was not supported by

<sup>a</sup> 1 Ld. Raym. 144, 1 Salk. 116.

<sup>b</sup> Ibid.

subsequent authority, and that in *Marshall v. Rutton*<sup>c</sup>, principles, quite inconsistent with those laid down by Lord Holt, in *Todd v. Stokes*, were to be found ; that the doctrine laid down by Lord Kenyon, in *Marshall v. Rutton*, was in opposition to the principle that the allowance of a separate maintenance to the wife exonerates the husband from that liability on implied assumpsits, to which the law subjects him, in support of his wife : that the circumstance of the plaintiff being a trustee in the deed, did not make any difference ; for the covenant to the plaintiff is to pay the allowance to the wife and to the plaintiff herself, so that she has no fund out of which she can pay herself ; and while she is enforcing the covenant at law, the wife must starve, unless the law raises an implied assumpsit in favour of all those who supply her with necessaries. The Court not being agreed upon this question, delivered their opinions *seriatim*, Chambre, Rooke, and Heath, Justices for the plaintiff, and Sir James Mansfield, in support of the nonsuit, for the defendant. The rule for setting aside the nonsuit was accordingly made absolute. It must be confessed, that great difficulties present themselves on any view of this case ; and this amongst others, that on the one hand it seems strange to say, that a mere covenant to pay, independent of any actual payment, shall operate as a discharge to the husband from his common law liability to provide necessaries for his wife ; while, on the other hand, it seems an equally strange proposition, that where a man has made himself liable by deed to the payment of a particular sum, for a particular purpose, he shall at the same time be liable to another distinct demand for the same purpose, in a different form of action. Since the decision of this case, it has been held, that a husband who had transferred personal property to trustees for the separate maintenance of his wife, was not protected from debts contracted by her subsequently for necessaries, unless he could show that the trustees had taken possession.<sup>d</sup> However, this case has settled the law on the

<sup>c</sup> 8 T. Rep. 545.

<sup>d</sup> Barret v. Booty, 8 Taunt. 343.

subject, at least for the present. It seems to follow from the reasoning in the above case, that it is essential to the exemption of the husband from the contracts of his wife for necessaries, not only that the maintenance should be paid, but that it should be adequate to his circumstances; for surely, if the mere covenant to pay would not produce that effect, the covenant to pay and the actual payment of an allowance inadequate to her wants, and to his means, must stand on very nearly the same grounds. For if a man possessed of 5000*l.* per annum separates from his wife, and covenants to pay her 5*s.* per annum, and does regularly pay it to her, the wife herself, and those who trust her for necessaries beyond the amount of 5*s.*, are in as bad a situation as if he had covenanted to pay 1000*l.* per annum, and had not paid any part of it. So that, in common sense, if a mere covenant to pay an *adequate* allowance will not discharge the husband from his liability to pay for his wife's necessaries, his covenant to pay and his actual payment of an inadequate allowance cannot have that effect. And, indeed, the sense of the profession upon the question is manifest from this circumstance, that in all the cases where a separate maintenance has been relied on in pleading, as affording protection to the husband against the creditors of his wife, it is stated, that the allowance was *competent*, and in some cases suitable to his degree and estate.<sup>d</sup> The very point has been expressly ruled by Lord Ellenborough, in the case of *Hodgkinson and Another v. Fletcher*,<sup>e</sup> where it appeared that the defendant and his wife had separated, by mutual consent, about ten years before, without any deed of separation or agreement in writing for an allowance between them; that he was a merchant, keeping a carriage, and living genteely, and had for several years past paid her an allowance of 300*l.* per annum; that the goods for which the action was brought were ordered by Mrs. Fletcher; that she was credited in plaintiffs' books

Husband's liability for wife not discharged even by payment of separate allowance, unless it be adequate.

<sup>d</sup> *Lean v. Schutz*, 2 Black. 1195. cited in *Corbet v. Poelnitz*, Marshall  
*Corbet v. Poelnitz*. 1 T. R. 5. v. *Rutton*, 8 T. Rep. 545.  
*Ringstead v. Lady Lanesborough*, e 4 Campbell, N. P. C. 70.

for them ; and that they had never heard of her husband till she desired them to apply to him for payment. It was admitted that the goods were necessaries suitable to Mrs. Fletcher's degree, and to her husband's circumstances. Lord Ellenborough said : " I hold that the defendant's liability depends on the *sufficiency* of the allowance he has made to his wife. But the allowance must be sufficient according to the degree and circumstances of the husband, and this is not proved by the mere acquiescence of the wife in the amount of the maintenance. She might be willing to accept a provision wholly inadequate, because she could get no more. If a contrary doctrine were to prevail, the husband would be discharged on proof that he paid, and that his wife received 40s. per annum. To destroy the credit she carries with her for suitable necessaries, he must prove he has paid her an adequate allowance." And his Lordship considering the adequacy of the allowance to be a question for the jury, accordingly left it to them, and they found for the plaintiffs. And it has been also held by Lord Ellenborough to be very strong evidence of the insufficiency of the maintenance, that the husband promised to pay some bills for his wife delivered to him after the separation.<sup>1</sup>— So that it would seem that in all future cases, where a separate maintenance by a husband on his wife shall be pleaded in bar of his liability, it ought to be averred that it has been paid and is competent ; or, if it be relied on in evidence, the same facts ought to be proved.<sup>2</sup> The case of *Hodgkinson v. Fletcher*, also proves what is very material, that the acquiescence of the wife, in an adequate allowance, does not affect the credit which she would otherwise carry with her for necessaries, so as to exonerate her husband. There was another point ruled in this case, which does not appear to have occurred before, and is of some importance,—namely, that if the allowance paid to the wife be sufficient, the husband is discharged from all liability, although it had not been settled by any deed or

Not necessary that separate maintenance should be secured by deed to operate as a discharge of husband's liability.

<sup>1</sup> *Hornbuckle v. Hornbury*, 2 Starkie, Rep. 177.  
<sup>2</sup> See also *Ozard v. Dornford*, and

*Turner v. Winter*, 1 Selwyn, N. P. 247. 5 edit.



writing. Indeed, Lord Kenyon ruled at *nisi prius*, in the case of *Stedman v. Gnoch*,<sup>h</sup> that it was necessary the separate maintenance should be secured to the wife by deed; and the Court above is reported to have inclined towards the same opinion, though no judgment was given on the question. In this case the action was against the wife alone, during the period in which a married woman was held to be rendered personally responsible for her own contracts, by a separation from her husband, and a separate maintenance. And in a later case,<sup>i</sup> Lord Eldon ruled, that a deed securing a separate maintenance, which had been executed by husband and wife only, and not by the trustee, was void, and was no answer to an action against the husband for necessaries for the wife; from which it is to be inferred, that his Lordship thought a deed necessary.

Although it is perfectly well settled, that where the husband rests his defence to an action for necessaries for his wife, on her previous adultery and elopement,<sup>j</sup> it is not requisite that the plaintiff should have had notice of the circumstance; yet if the defence be a separation and separate maintenance, there is some difference of opinion, whether it be necessary that the plaintiff should have had notice of the separate maintenance. In *Todd v. Stokes*,<sup>k</sup> Lord Holt held that personal notice to the plaintiff was not requisite. Lord Mansfield also ruled that notice to the creditor of the wife that she had a separate maintenance, was not necessary to discharge the husband from his liability, because the creditor is to be considered as standing in the place of the wife, and it imports him to make strict inquiry, as to the terms of separation, for in such cases he must trust her at his peril.<sup>l</sup> And in *Turner v. Winter*<sup>m</sup> his Lordship nonsuited the plaintiff, because the defendant had agreed to pay his wife an allowance, and had paid it, although the plaintiff had no notice of the transaction. However, Lord Eldon, when Chief Justice of the Common Pleas, held that

Notice to creditor of separate maintenance held by Holt C. J. and Lord Mansfield not to be necessary for discharge of husband.

Contra by Lord Eldon.

<sup>h</sup> 1 Esp. N. P. C. 3.

<sup>i</sup> *Ewers v. Hutton*, 3 Esp. N. P. C. 255.

<sup>j</sup> 1 Strange, 647. 706.

<sup>k</sup> 1 Salk. 116. 1 Lord Raym. 444.

<sup>l</sup> *Ozard v. Thornford*, 1 Selw. N. P. 279.

<sup>m</sup> 1 Selw. N. P. 220.

where the tradesman's demand is for necessities, it is incumbent on the husband to show, that the tradesman knew of the separate maintenance.<sup>n</sup>

Formerly held, that husband was liable to wife's debts, if she had not separate maintenance, although she had other adequate means, not derived from him.

It was at one time decided by the Court of King's Bench, in the case of *Thompson v. Hervey*,<sup>o</sup> that whatever means of subsistence a wife might possess, they could not operate as a protection to the husband against the claims of her creditors for necessities, unless that provision were derived from the husband himself, and out of his estate. In this case, an action had been brought against the defendant for lodging and necessities furnished to his wife, and a verdict was found for the plaintiff. It appeared on the trial that Mrs. Hervey had a pension of 300*l.* per annum from the crown during pleasure, granted to her in her own name, but not appropriated to her own use by any agreement; that her husband had shut his doors against her; that he had never made or agreed to make any separate allowance to her, or had contributed towards her support, since he had turned her out of his house. It was also proved that Mr. Hervey had the reputation of having an income of 1800*l.* per annum. There was a motion for a new trial, and the Court were unanimously of opinion, that Mr. Hervey was liable to the action, having turned his wife out of doors without a separate maintenance. That the pension was a mere voluntary grace of the crown during pleasure, upon which no creditor of Mrs. Hervey could have been supposed to have given credit.

Now held, that husband is not liable if wife has other means, though no separate allowance from him.

However, it has been since decided that if the wife's own resources are adequate to her maintenance, according to the rank and fortune of her husband, he is not liable for necessities supplied to her during separation, although no separate maintenance had been paid by him. This rule was laid down by Lord Ellenborough in *Liddlow v. Wilmot*,<sup>p</sup> where his Lordship said, "If the husband turn his wife out of doors, or by the indecency of his conduct preclude her from living with him, he is liable for necessities

<sup>n</sup> *Rawlins v. Vandyke*, 3 Esp. N. P. C. 250.

<sup>o</sup> 4 Burr. 2177.  
<sup>p</sup> 2 Stark. 86.

for her, only in case of the insufficiency of her own funds; but if, either from her husband, or from other sources, she is possessed of adequate means of support according to her situation, the law gives no remedy against the husband. On the same principle, Lord Holt held, where an ordinary working man had married a woman of the like condition, and afterwards abandoned her, that on an action having been brought against him for her diet, the money she had earned should be applied to support her. <sup>1</sup>

But, although an adequate separate maintenance paid by a husband to his wife, when they have ceased to cohabit, is a bar to any action against him for necessaries supplied to her, yet he does not thereby throw off his common law liability to maintain her; on the contrary, his payment of that maintenance is an acknowledgment and a performance of that duty. His legal liability for necessaries for her can never for a moment be suspended by the execution of any instrument; and whenever he resists the payment of such a demand, it is never on the ground that he is not bound to provide his wife with necessaries, so long as she conducts herself with propriety; but it is on this ground, that he is not liable to the person suing, because he has already discharged that debt, by the payment to the wife of her stipulated separate allowance. It is therefore inaccurate to say that a husband has freed himself from his common law liability to maintain his wife, when he supplies her with a suitable and competent separate maintenance, as by that very act he admits his liability, and discharges the obligation.

The husband is relieved from his liability for the engagements of his wife for necessaries, not only by a separation by mutual agreement, and a separate maintenance paid by him, but also by a decree of the Ecclesiastical Court, directing alimony to be paid to the wife. And if necessaries be supplied to her before alimony is decreed, but at a period to which the decree relates back, and for which it

Husband liable for necessaries for wife, although there was a subsequent decree for alimony for the period during

<sup>1</sup> Warr v. Huntly, 1 Salk. 118.

which the necessities were furnished.

directs the alimony to be paid, still the husband is liable to the person supplying them. As where the wife, in March, 1824, instituted a suit in the Ecclesiastical Court against her husband, for cruelty and adultery, and a decree was pronounced in December following that he should pay her 30*l* per annum *pendente lite*, to commence from the March preceding. On an action for diet and lodging furnished to defendant's wife from July to November, the husband was held liable, although the alimony was to be paid from a date prior to the time when the necessities were provided. <sup>r</sup>

A man is bound to pay for necessities furnished to any woman he represents to be his wife.

Whether the person supplying them knew they were not married or not.

A man having two wives, liable for necessities furnished for the second.

And a man is not only liable for necessities furnished to his wife, but to any woman whom he represents to be his wife, and whom he permits to use his name. In *Watson v. Threlkelds*,<sup>r</sup> the delivery of the goods to the woman at the defendant's lodgings was proved, and also that he had chosen some of the articles for her, and that she used his name, and was called by it in his presence. It was contended for the defendant, that the plaintiff knew he was not married, so that he could not look to defendant's credit, but to the woman's own. But Lord Kenyon said, "It is certain, that if a man has permitted a woman, to whom he was not married, to use his name and to pass for his wife, and in that character to contract debts, he is liable for her debts; and I am of opinion that he is liable, whether the tradesman who furnished the goods knew the circumstances to be so or not. He gives her a credit from her name and cohabitation." And if a man, being already married, marries a second woman, he will be liable for necessities furnished to the second wife during their cohabitation, and cannot discharge himself by proof of the previous marriage.<sup>t</sup> But if it could be proved that the plaintiff knew of the celebration of the first marriage, it would be a bar to the action.<sup>u</sup> However, if the goods were furnished to the woman after the defendant and she have ceased to cohabit,

<sup>r</sup> *Keegan v. Smith*, 5 Barn. & Cress. 375.

<sup>u</sup> 2 Espin. N. P. C. 637.

<sup>t</sup> *Robinson v. Nahon*, 1 Camp. 245.

<sup>u</sup> *Ibid.*

the plaintiff cannot recover, if it be proved that they never were married, though they had lived together as man and wife for seventeen years, and he had always introduced her into society as such." Lord Ellenborough said, "Had the goods been furnished while the defendant was living with this lady, his representation that she was his wife would have been conclusive against him; but I think his liability for necessities supplied to her after they had separated, depends entirely upon whether he really has been lawfully married to her or not. If the jury think upon the evidence that she is indeed his wife, they will find for the plaintiff, but the action cannot otherwise be maintained." The jury found for the plaintiff.

Although a husband is bound to provide necessities for his wife and family, yet he is not liable, if the necessities have been supplied to the children of his wife by a former husband. And, accordingly, where a covenant was executed to pay all the debts of a married woman, which her husband was by law liable to pay, it was held not to extend to a debt contracted by her for her support of her son by a former marriage." And the same principle was established in *Cooper v. Martin*.<sup>x</sup> But where the husband takes the children of his wife by a former husband into his house, and suffers them to live with him as part of his family, he will be liable for contracts made by his wife for their education, whether he has possessed himself of property belonging to them or not.<sup>y</sup>

Husband not liable for necessities supplied to children of his wife by a former husband, unless they live in his house.

The liabilities which have been enumerated in this chapter, as attaching upon a man with respect to his wife, cease altogether, when the Ecclesiastical Court pronounces the marriage to have been void *ab initio*, and the woman becomes as much a feme sole from the date of the sentence, as if she had never been married. And if she purchase any articles after that period, she alone is liable.<sup>z</sup> However, if

Husband's liability for wife terminated by sentence of the Ecclesiastical Court, declaring the marriage void *ab initio*.

<sup>v</sup> *Munro v. De Chemant*, 4 Camp. 215.

<sup>w</sup> *Tubb v. Harrison*, 4 T. Rep. 119.

<sup>x</sup> 4 East, 76.

<sup>y</sup> *Stone v. Carr*, 3 Esp. N. P. C. 1.

<sup>z</sup> *Anstey v. Manners*, 1 Gow. 10.

the divorce be only *a mensa et thoro* for adultery, it does not destroy the relation of husband and wife, and she is not afterwards liable as a *feme sole*; and her legal incapacity to act was considered to continue so far notwithstanding such divorce, that the Court set aside a judgment entered on a warrant of attorney given by her after such divorce.<sup>b</sup>

As the law requires the husband to supply his wife with *necessaries*, and charges him with payment for them, when they have been supplied by others, except under the circumstances detailed in the preceding part of this chapter, it becomes expedient to inquire and ascertain what description of articles is included within the meaning of this term. And it appears that clothes, meat, medicine, and habitation,<sup>c</sup> and even sometimes legal advice,<sup>d</sup> are necessaries with which the law says the husband is bound to provide his wife, and for which, if another should supply her with them, the husband is liable to pay. But then, to bind the husband, these provisions must be consistent not only with his rank, but also with his estate; for, as Lord Chief Baron Hale observes in his argument in *Manby v. Scott*,<sup>e</sup> a high degree may have a low estate, and then the wife cannot expect to be maintained according to the height of her husband's degree. And accordingly one of the resolutions in that celebrated case was, "That (admitting that the husband is liable on an implied assumpsit for necessaries) the finding of the jury, that the things bought by the wife are necessaries suitable to the degree of the husband is not good; for the law is, that wives shall be maintained according to the estate, and not according to the degree of their husbands. And it is not reason that the wife of a poor knight of 200*l.* per annum should have as expensive dress as the wife of a knight who has 2000*l.* per annum; wherefore in this case, so circumstantiated, judgment cannot by any possibility be given for the plaintiff. But the jury ought to have

Husband not liable for articles supplied to his wife, inconsistent with his estate.

<sup>a</sup> *Lewis v. Lee*, 3 Bar. & Cress. 291. 5 Dowl. and Ryl. 98.

<sup>b</sup> *Faithorne v. Lee*, 6 Maul. & Selw. 73.

<sup>c</sup> *Manby v. Scott*, 1 Bac. Ab. 296. d 3 Camp. 326.

<sup>e</sup> 1 Bac. Ab. 296.

found that they were necessaries suitable to the estate and degree of the husband, or that they were necessaries generally.<sup>f</sup>

But a husband may render himself liable for articles furnished to his wife quite inconsistent with his means ; for, as Lord Ellenborough observed, " however low a man's circumstances may be, if he permit his wife to assume an appearance which he is unable to support, he is answerable for the consequences. When a tradesman is thereby deceived, the loss must fall on him, who connived at the deception. Whatever may be the husband's degree, he sends his wife out into the world with a credit corresponding to the rank in which by his sanction she affects to be placed." His Lordship added, that " it is the duty of tradesmen to make inquiries before trusting a married woman, who is a stranger to them " <sup>g</sup> In the case referred to, the defendant did not cohabit with his wife, but occasionally saw her, and she, when she ordered the goods for which the action was brought, called at the shop accompanied by a man dressed as a livery servant, and talked of her husband having just taken a new house, which he was about to fit up in a style of elegance. <sup>h</sup> The defence was, that the goods furnished were neither necessaries nor suitable to the circumstances of the defendant, and that as he was not living with his wife when they were supplied to her, he was not liable for them. It was also proved that shortly before she had a well furnished wardrobe for a lady in a middling rank of life, and that the whole income of the defendant amounted only to 100*l* per annum, allowed to him by his brother. The verdict was for the full sum claimed, 34*l*. 13*s.*, although his Lordship told the jury, that as the plaintiff had trusted the wife for want of information, which might easily have been obtained, if they should obtain a verdict at all, their demand should be re-

Husband liable for articles furnished to his wife, however inconsistent with his means, if consistent with the rank he permits her to assume.

<sup>f</sup> 1 Sid. 128.  
<sup>g</sup> Waithman & Another v. Wakefield, 1 Camp. 120.

<sup>h</sup> See also Bently v. Griffin, 5 Taunt. 356.

duced to the charge for necessities suitable to the circumstances of the defendant.

Husband not liable for articles inconsistent with his rank, furnished to his wife, where she has not worn them in his presence.

And even where the husband does cohabit with his wife, if the articles furnished for her use be inconsistent with his fortune and rank in life, his assent is not to be presumed, as it would be where the goods supplied were of an ordinary nature and for common use. As in *Montague v. Benedict*,<sup>1</sup> where the defendant was a special pleader, to whose wife the plaintiff, a jeweller, had furnished jewels, consisting of diamonds, rings, necklaces, bracelets, and a gold watch and chain, to the amount of 83*l.* 6*s.* in the course of about six weeks. It appeared that the defendant had had something less than 4000*l.* with his wife ; that they lived in a furnished house at the rent of 200*l.* per annum ; that defendant did not keep a man-servant ; that the wife had jewellery consistent with her situation before the present purchase ; and that she had never worn any of the articles furnished by the plaintiff in her husband's presence. Lord Chief Justice Abbot told the jury, that a husband was not liable for goods supplied to his wife, unless he gave her an express or implied authority to purchase. In considering the question of authority, the estate and degree of the parties was a fit subject for consideration, and so also was the nature of the articles. There were some things which it might and must always be presumed the wife had authority to buy, such as provisions for the daily use of her family ; but that in this case the articles were not necessary for any one, the husband never saw them, and the jury were to say, whether the wife had any authority from him to make the contract for the articles in question. The jury found for the plaintiff ; and on a motion to enter up a nonsuit, or for a new trial, the rule for a nonsuit was made absolute, on the ground that there was no express assent, that the articles supplied were merely ornamental, and not necessary, and were unsuitable to the defendant's situation and circumstances in life.

<sup>1</sup> 3 Barn. & Cress. 631. S. C. reported under different names, 1 Car. 502 & D. & Ry. 532.



But if the articles furnished to the wife be correspondent to the rank and fortune of the husband, he is liable. As where a tradesman furnished the wife of a serjeant, afterwards a judge, with lace and silver fringes for a petticoat and side-saddle, which amounted to 94*l.*, and all within four months, they were held to be necessaries, and a verdict was found for the plaintiff.<sup>j</sup> It appeared in this case that defendant and his wife cohabited at the time of the delivery of these goods, and that they were used in his presence, but that defendant and his wife had lived separately for three or four years before, and that since the cohabitation, she had declared she would charge him with 500*l.* in one term, and have him in gaol the next. And Lord Chief Justice Treby told the jury, if they believed the plaintiff innocent of the wife's design to ruin her husband, they should find for him.

Husband liable for articles suitable to his rank, furnished to his wife.

Lace and silver fringes for a petticoat, and a side-saddle, are necessaries for the wife of a serjeant at law.

It is to be observed, that, in estimating what are necessaries for the wife, no account is to be taken of the fortune brought by her; the jury must regulate their verdict by the circumstances of the husband when the articles were supplied.<sup>k</sup>

What are necessaries for the wife to be governed by the means of the husband when

they were supplied, not by the fortune which she had brought.

However, although the husband be liable for necessaries furnished to his wife, and although clothes be necessaries, yet if she do not apply them to the use for which they were intended, but for a different purpose, he will not be chargeable for them. As Lord Holt laid it down in *Etherington v. Parrot*,<sup>l</sup> that "if a wife takes up silks, and pawns them before they are made into clothes, the husband shall not be liable for the silks, because they never came to his use; *contra*, if they were made into clothes and worn by the wife, and then pawned by her. But if the wife pawn her clothes for money, and afterwards borrow money to redeem them, the husband is not chargeable, unless he were consenting, or unless the first money came to his hands."<sup>m</sup>

Husband not liable for silks pawned by the wife before they have been made into clothes.

Not liable for money borrowed by the wife to redeem clothes pawned by her.

<sup>j</sup> Morton v. Within, Skin. 349.  
<sup>k</sup> 3 Esp. N. P. C. 255.

<sup>l</sup> Salk. 118. 2 Lord Raym. 1006.  
<sup>m</sup> 2 Show. 290. Anon.

Medical assistance, necessities.

Legal assistance, when rendered requisite by the husband's conduct, a necessary for which he is liable.

So not only clothes are necessities, for which, when furnished to the wife, the husband will be liable, but medical assistance also, if the wife's health should require it.<sup>a</sup>

Legal assistance may also be in some instances a necessary, which, if supplied to the wife, the husband must pay for it. As where he turned his wife out of doors without just cause, with circumstances of great violence, and she exhibited articles of the peace against him; the attorney who prepared the articles brought an action against the husband for this business done on the retainer of the wife, and had a verdict.<sup>o</sup> And Lord Ellenborough observed in this case, speaking of the articles of the peace, that "if that proceeding was uncalled for, his wife certainly could not make him liable for the expense thereby incurred. But if she was turned out of doors in the manner stated, she carried along with her a credit for whatever her preservation and safety required. She had a right to appeal to the law for protection, and she must have the means of appealing effectually. She might therefore charge her husband for the necessary expense of this proceeding, as much as for necessary food or raiment." In like manner, in *Williams v. Fowler*,<sup>p</sup> where the defendant had driven his wife from his house by his cruelty towards her, and proceedings at her suit, at law and equity, arising from his misconduct, were instituted against him by the plaintiff, an attorney, it was held that the husband was liable to the amount of the plaintiff's bills of costs incurred in these proceedings. It must be observed of these two preceding cases, that the husbands' consent to the suits, which had been carried on against them, could not be presumed, as they were directed against themselves. The cases therefore turn on this circumstance, which is common to both, that the proceedings were rendered necessary by the defendants' own conduct towards their wives, and the question for

<sup>a</sup> n 1 Bac. Ab. 296. *Harris v. Lee*, 1 P. Wms. 462.

<sup>o</sup> *Shepherd v. Mackoul*, 3 Camp. 326.  
p 1 M'Lel. & Y. 269.

the jury in all such cases must be, whether the treatment of the wife by her husband was so bad as to render her having recourse to legal protection necessary.

However, although the several articles specified are considered as necessaries, yet money lent to the wife, for the purpose of procuring them, is not a necessary for which the husband is liable, although the money should have been expended in the purchase of actual necessaries. And the reason is this, that a married woman cannot *at law* borrow money, because though borrowed under the pretext of purchasing necessaries with it, she has the power of wasting and misapplying it. In *Harrie v. Lee*,<sup>q</sup> the plaintiff had supplied the wife of the testator with money in her necessities, and now brought his bill against the executors of the husband, (who had devised his lands for payment of his debts,) for a discovery of assets and a satisfaction thereof of his debts; and it was held that he could have no relief on that head, though the most unkind and cruel usage of the husband was proved, and that the money lent was actually laid out and applied for necessaries.

Husband not liable for money lent to the wife to purchase necessaries.

But though the plaintiff can have no relief at law or equity against the husband or his executors under such circumstances, yet the Master of the Rolls held that the lender of the money should stand in the place of those tradesmen, who had supplied the wife with goods, and be let into a satisfaction for so much as he could prove to have been advanced or delivered to her by them, as necessaries, but for nothing more.

<sup>q</sup> 1 P. Wms. 483. Prec. Chan. 502. 2 Eq. Cas. Ab. 135.; see also *Earle v. Peale*, 1 Salk. 387.

## CHAP. IV.

OF THE SOLE LIABILITY OF A MARRIED WOMAN FOR HER  
OWN DEBTS CONTRACTED DURING THE MARRIAGE.

By the  
common  
law, a mar-  
ried woman  
cannot sue  
or be sued.

The queen  
excepted.

By the Common Law of England, a married woman is incapable of entering into any engagement as a *feme sole*, or of suing or being sued as such. There are, however, exceptions to this rule, as circumstances may arise during the marriage, under which she would acquire a separate and independent character, and become capable of contracting, and of suing and of being sued, and subject to all the responsibilities which would attach upon her if she were sole. For instance, the wife of the King of England is of ability to sue and be sued as a *feme sole*; <sup>a</sup> and the reason assigned by Lord Coke for this special exception is, that the wisdom of the common law would not have the king (whose continual care and study is for the public good, *et circa ardua regni*,) to be troubled and disquieted for such private and petty causes.

It is said that a wife may sue even her husband; there is, however, only one occasion mentioned in the books, on which she can have this remedy, and that is, where he has levied a fine in her name, when she shall have a writ of deceit against him. <sup>b</sup>

Wives of  
banished  
persons  
may sue  
and be  
sued as  
*femes sole*.

The wives also of persons banished from the country may sue and be sued as *femes sole*; and Lord Coke has given four instances in which they were parties to suits without their husbands having been joined. In two of these cases the married women were plaintiffs, and in the other two they were defendants. <sup>c</sup> The instances of the first kind

<sup>a</sup> Co. Lit. 133 b.

<sup>b</sup> Co. Lit. 133 a. note 4.

<sup>c</sup> Co. Lit. 133 a.

are where the wife of Sir *Robert Belknap*, one of the justices of the Common Pleas, who was exiled or banished beyond sea, sued a writ in her own name, without her husband, he being alive ; and where the wife of *Thomas of Weyland*, being abjured the realm, joined her son in a petition of right to the parliament for the manor of Sobir, wherein her husband had but an estate for life jointly with her. The instances furnished by the same writer in which married women were sole defendants, are, one case where Edward the Third brought a writ of *quare impedit* against Lady *Maltravers* ; and another where Henry the Fourth brought a writ of ward against Sibel B—, in both of which the defendants pleaded that they were covert of person ; and it was replied that their husbands were exiled, and they were ruled to answer. Besides these cases, it also appears that the same Lady *Belknap*, who is stated above to have sued as a plaintiff, was sued without her husband in the preceding year, 1 Hen. 4., and that her plea of coverture was overruled on a replication that her husband was exiled. In like manner, in *Elizabeth Wilmot's case*,<sup>d</sup> it was decided by Lord Coke, upon the authority of the above cases, that a married woman, whose husband was in full life at Lisbon, in Portugal, might maintain an action of trespass as a widow. And this exile of the husband, though it does not dissolve the marriage, renders the wife almost in every other respect as a *feme sole*. In the 31 Ed 1. it was holden, that the wife of one who had abjured the realm could make a feoffment by deed with warranty of her land, and should be bound to it.<sup>e</sup> And in more modern times it was decided in the case of the *Countess of Portland v. Prodgers*,<sup>f</sup> that a married woman, whose husband was banished by act of parliament for life, might make a valid will, the Court being of opinion that such a banishment rendered her capable of acting in all things as a *feme sole*, and as if her husband were dead, and that the necessity of the case required she should have such power.

Wife of person banished by act of parliament may make a will.

<sup>d</sup> Moor. 851.

<sup>f</sup> 2 Ver. 104.

<sup>e</sup> Fitz. Abt. cui in vita, pl. 31.

Wife of  
person ex-  
iling him-  
self by  
consent  
rendered  
capable of  
suing and  
being sued.

And even where the husband has not been banished by act of parliament, but has consented to exile himself, that has been held to restore to his wife the capacity of a *feme sole*. This occurred in the case of *Newsome v. Bowyer*,<sup>g</sup> where the husband having been attainted of felony, was afterwards pardoned, on condition that he should transport himself for life out of his Majesty's dominions. After the pardon, a share of the orphanage part devolved upon his wife ; and it was contended that this share belonged to the husband, it having come after his pardon. On the other hand it was said, that the voluntary exile would produce the same effect as if he had been banished by act of parliament, and that it made his wife a *feme sole*, and gave her a right to this personal estate . and Lord Chancellor King, after some hesitation, ordered the money to be laid out in government securities, and that the interest and produce, and the arrears of the dividends of South Sea annuities, and the future dividends, should be paid to the wife till further order. On one occasion it was held that a divorce of husband and wife, *a mensa et thoro*, enabled her to sue as a *feme sole*, without her baron, as the wife of an exile might.<sup>h</sup> And this appears the more singular, because, in the same case, it was decided, that the husband might release a legacy bequeathed to the wife by her father after the divorce, and for which she had sued the executor in the Court Christian. The reason given for this capacity of a married woman, during her husband's life, he being an exile, is, that an abjuration, that is, a deportation for ever into a foreign land, is a civil death.<sup>i</sup> In the time of Lord Coke, the banishment of the husband would not produce this effect on the wife, unless it were perpetual ; for his Lordship lays it down, that if the husband, by act of parliament, have judgment to be exiled but for a time, which some call a relegation, that is no civil death.<sup>j</sup> But although Lord Coke states the law to be so, yet it is observable that, in one of

<sup>g</sup> 3 P. Wms. 37.

<sup>h</sup> Stephens v. Tott, Moor. 665.

<sup>i</sup> Co. Lit. 133 a.

<sup>j</sup> Ibid.

the instances which he gives, viz. that of Sibel B—, it appears from the replication in the pleadings, that her husband was relegate or exiled into Gascoigne, there to remain only until he obtained the King's grace.<sup>k</sup>

However, though a temporary banishment be not a civil death, yet so long as it continues it effects the same inconvenience; and therefore, in such a case, there is an equal necessity that the wife should be considered as a *feme sole*.<sup>l</sup> Accordingly, in modern times, it has been held, that if the husband be transported for seven years, such temporary absence operates as a suspension of the wife's disability to contract; and Lord Kenyon has said on one occasion, that the old common law principle of abjuration of the realm by the husband, was applicable even to the case where the husband had left the country but for four years.<sup>m</sup> In *Sparrow v. Carrothers*,<sup>n</sup> which was an action against a married woman for the amount of a note passed by her, the defence was coverture; to which it was replied, that her husband was transported, and that his time was not yet expired; and Justice Yates held, that the transportation suspended the disability of the wife to contract and be sued. Here the married woman was defendant; but the same principle was established in *Carroll v. Blencow*,<sup>o</sup> where she was plaintiff. There to assumpsit for goods sold and delivered, the defence was that the plaintiff was a married woman; to which the answer was, that her husband had been transported for seven years; and it not being proved that the term of his transportation had expired, and that he had returned, Lord Alvanly held that the record of conviction and of the sentence was conclusive as to the plaintiff's right to sue as a *feme sole*, and that if he had not returned, the same right remained. On the same principle, it seems that the wife of an alien enemy may sue and be sued as a *feme sole*, as her husband is under the same disability of coming into

Transportation of husband for a limited period, renders the wife capable of suing and being sued during the term.

Wife of alien enemy may sue and be sued as a *feme sole*.

<sup>k</sup> Co. Lit. 133 a.

<sup>l</sup> Ibid. note 209.

<sup>m</sup> Walford v. Duchesse de Pienne,

<sup>2</sup> Esp. Cas. 554.

<sup>n</sup> Cited in Corbet v. Poelnitz, 1

T. R. 6.

<sup>o</sup> 4 Esp. Cas. 27.

England, as if he had been banished or transported. It was so decided in *Dearly v. Duchess Mazarine*,<sup>p</sup> where an assumpsit for wages and money lent, and non-assumpsit pleaded, the defendant proved that she was married, and her husband alive, in France. The jury found for the plaintiff; and on a motion for a new trial, it was refused; for it shall be intended she was divorced. Besides, the husband is an alien enemy, and in that case, why is not his wife chargeable as a *feme sole*, as if he had abjured or been banished?

It was afterwards decided, that even a voluntary absence of the husband would sometimes produce the same effect, as in *Walford v. Duchesse de Pienne*,<sup>q</sup> which was an action of assumpsit for goods sold and delivered. The defendant pleaded that she was covert of the Duc de Pienne, and proved the marriage, and that the Duke, who was a foreigner, had gone abroad three years before, and had not since returned, during which interval the Duchess had kept house and paid bills for goods furnished on her own account, and in her own name. It was also proved, that on his leaving the country, he expressed an intention of returning to it in a few months; and as the witness believed, had not abandoned his intention of returning, though he had not yet done so. Lord Kenyon ruled that the defendant was liable, and said that the present case came within the principle of the old common law, where the husband had abjured the realm. His Lordship also, in the subsequent case of *Franks v. Duchesse de Pienne*,<sup>r</sup> held the same language, adding, however, that if the defendant's husband had been an Englishman, who might be presumed to have the *animus revertendi*, it might be different. But this question was afterwards solemnly decided on demurrer in the case of *De Gaillon v. L'Aigle*.<sup>s</sup> There the action was assumpsit, the declaration containing the common money counts. The defendant pleaded coverture at the time of

Ruled by Lord Kenyon, that the wife of a foreigner voluntarily leaving England, is capable of suing and being sued.

p 1 Salk. 116. 2 Salk. 646. 1 Ld. Raym. 147.  
q 2 Esp. Cas. 554.

r 2 Esp. Cas. 587.  
s 1 Bos. & Pul. 557.



the contract ; to which the plaintiff replied, that at the time of the contract, and from thence hitherto, the said John Martin Harel L'Aigle (defendant's husband) lived and resided in parts beyond the seas, to wit, at Hamburgh ; and that during all that time the said *Victoria* (the defendant) lived in this kingdom, separate and apart from the said John Martin. To this replication there was a general demurrer and joinder, and judgment was given for the plaintiff ; the Court considering the cases of banishment and transportation as directly in point.

It must be observed, that it did not appear in the above case, whether the defendant's husband had ever been in England or not. However, all the authorities, in which it has been ruled that the voluntary departure of the husband, whether a foreigner or a natural born subject, from England, rendered his wife solely responsible for her engagements, have been since over-ruled. In *Farrer v. The Countess Dowager of Granard*<sup>t</sup>, it was decided that the departure of the husband from England merely to Ireland, and his residence there, did not render his wife liable for her contracts. In this case, assumpsit was brought for the use and occupation of furnished lodgings, and for money paid, had, and received, and on an account stated and settled. The defendant pleaded, that, at the time of making the promises aforesaid, she was and yet is the wife of the Reverend Samuel Little, who is still living. The replication was, that before and at the time of making the said promises, and continually from thence hitherto, the said Samuel Little lived and resided in parts beyond the seas, to wit, in Ireland ; and that during all that time the said defendant lived in this kingdom separate and apart from the said Samuel, as a single woman, and that the defendant made the aforesaid promises as a single woman. To this replication there was a general demurrer, and the demurrer was allowed, although it was argued for the plaintiff that the averment in this replication, that the hus-

Wife, whose husband, a natural born subject, departs voluntarily from the realm, not rendered sole by such departure.

band lived and resided in Ireland, called on the defendant to show, that the absence of the husband was merely temporary. But Sir James Mansfield, Chief Justice, said "that the terms of the replication are perfectly consistent with a mere temporary absence; that they might be applied to the case of every man who goes for a short time to live in Scotland or Ireland, and whose wife in the mean time contracts debts here."

Wife of an alien who had been in England and had left it, not rendered a *feme sole* thereby.

And Lord Ellenborough held, that the wife of an alien could be sued as a *feme sole*, only where her husband had never been in England, or, if having been in England, he had left it and was under a legal disability to return to it; and so far his Lordship over-ruled Lord Kenyon's decisions in *Walford v. Duchesse de Pienne*<sup>u</sup>, and *Frank v. Duchesse de Pienne*.<sup>v</sup> This was in the case of *Kay v. Duchesse de Pienne*<sup>w</sup>, which was an action on a promissory note, the defence to which was coverture. It appeared that the Duchesse was a French emigrant, and that before the French revolution she lived with the Duc de Pienne as his wife, and was received in that character at the court of Louis XVI. That they came to England and lived some time together as man and wife, but that he left this country in 1803 to enter into the service of Sweden, and had remained abroad ever since. It was contended that under these circumstances she might contract as a *feme sole*, and consequently might be sued as such. But Lord Ellenborough said, "If the husband has never been in this kingdom, the wife of an alien, I think, may be sued as a *feme sole*. That is the Duchess of Mazarine's case. I do not know whether it was brought to Lord Kenyon's attention, that the Duc de Pienne had been living with the defendant as his wife within the realm. If so, I cannot subscribe to his opinion. Since the case of *Marshall v. Rutton*<sup>x</sup>, which restored the old common law upon this subject, I consider it quite clear that a married woman,

<sup>u</sup> 2 Esp. Rep. 554.  
<sup>v</sup> 2 Esp. Rep. 587.

<sup>w</sup> 3 Campb. Rep. 123.  
<sup>x</sup> 8 T. Rep. 545.

under the circumstances of the present defendant, is not liable to be sued as a *feme sole*." The plaintiff was nonsuited. In the ensuing term a motion was made to set aside this nonsuit, but the Court fully concurring with the directions of the Chief Justice at Nisi Prius, refused a rule to show cause.

And if an Englishman go voluntarily to reside in a foreign country, his wife is not thereby rendered liable as a *feme sole*. This was decided in *Marsh v. Hutchinson*,<sup>y</sup> which was an action for coals supplied to the defendant, a married woman, to which she pleaded *non assumpsit*, and her defence was coverture. It appeared that her husband was an Englishman; that in 1783 he left England, and had been occasionally in it since that period; but that about the year 1790, having purchased the appointment of agent for the English packets at the Brill, in Holland, he had resided there ever since. That he was possessed of madder grounds in that country; that on the irruption of the French into Holland, he sent his wife and family to reside in England, but remained himself in Holland to look after his madder grounds, and also with a view to recover his situation, if the intercourse between England and Holland should be re-established. It also appeared that the defendant lived in Norfolk, and was considered as a married woman. The counsel for the plaintiff insisted that the husband of the defendant, being domiciled in a foreign country from which he was not likely to return, the defendant must be treated as a *feme sole*, and therefore capable of making contracts to bind herself. But the plaintiff was nonsuited, with liberty to move to set the nonsuit aside, and enter a verdict for the plaintiff to the amount ascertained by the jury. As the case of *Marshal v. Rutton*,<sup>z</sup> in which it was expected that the whole doctrine respecting the liability of a *feme covert* to be sued would be fully discussed, was then pending before the twelve judges, the Court desired that this case might stand over until that had been deter-

Wife of an Englishman who voluntarily resides abroad, not rendered a *feme sole* thereby.

<sup>y</sup> 2 Bos. & Pul. 226.

<sup>z</sup> 8 T. Rep. 545.

mined ; and after the decision of this latter case, the Court refused to set aside the nonsuit. • In this case Mr. Justice Heath said, “ There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king’s privy seal ; but in the old cases of banishment and abjuration, as as well as in the more modern one of transportation, the husband could not return, as it would have been contrary to law. There is no case in which the wife has been held liable, the husband being an Englishman.”

Wife of Englishman who abandons her and goes beyond the seas, not rendered a feme sole.

*Bogget v. Frier*,<sup>a</sup> is in conformity with this decision, and proves that a married woman is incapable of suing a *feme sole*, though her husband, a natural born subject, should have abandoned her, and gone to reside beyond the seas. The action in this case was trespass for breaking and entering the house of *Anne Bogget* ; the plea was coverture, and the replication that before the time of committing the trespass the husband of the plaintiff had deserted the plaintiff, and had departed out of the kingdom to America. without leaving any means of provision and support to the plaintiff, and that from the time of his departure he had not returned nor corresponded with, nor been heard of by the plaintiff, and that during all that time plaintiff had lived in this kingdom separate and apart from her said husband, and made contracts and obtained credit as a single woman ; and, for her necessary support, had during that time carried on the business of a merchant as a single woman and sole trader. Rejoinder, That the husband was a natural born subject, and that he had not abjured this realm or been exiled or banished, or relegated therefrom To which there was a general demurrer. And the Court decided for the defendant, on the authority of the preceding case,<sup>b</sup> and of *Marshall v. Rutton*,<sup>c</sup> and *Chambers v. Donaldson*.<sup>d</sup> From

<sup>a</sup> 11 East. 301.

<sup>b</sup> *Marsh v. Hutchinson*, 2 Bos. & Pul. 226.

<sup>c</sup> 8 T. Rep. 545.

<sup>d</sup> 9 East, 471.

these cases the law now seems to be, that if the husband be a foreigner, who never has been in England,<sup>e</sup> or, if being an Englishman, he depart from the realm compulsorily, without the power of returning, such absence in either instance renders the wife capable of contracting, and therefore of ability to sue and be sued, and to acquire and to dispose of property as if she were sole. And that, if the husband be a natural born subject within this kingdom, his absence from it under any circumstances, unless he have abjured the realm, or have been exiled from it, will not render his wife capable of contracting or acting as a *feme sole*, or of suing or being sued as such.

It does not appear from any of the cases on this subject to what extent a married woman is rendered sole by the transportation for life of her husband, the authorities going no further than to decide, that in matters of contract she is capable of suing and being sued. But there is no decision, that under such circumstances she can sue for a trespass, or be sued for it, or that she is entitled to dower, or to her jointure, or to the rents and profits of lands, of which he had been seised in her right. However, as abjuration of the realm by the husband has been held to be a civil death, and to confer these rights on the wife,<sup>f</sup> it is to be presumed that transportation for life would produce the same effect. As to transportation for a term of years, Lord Eldon observes,<sup>g</sup> "it may give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal. But," his Lordship adds, "besides the difficulties which might arise during the term of the transportation, another difficulty of equal importance occurs, where the wife has contracted debts after the period of her husband's transportation has elapsed, but before his actual return to this country."

But this doctrine of the capacity of a *feme covert* to sue and be sued as a *feme sole*, was for some time carried still Held formerly that separation]

<sup>e</sup> 3 Camp. 123.

<sup>f</sup> See Lord Eldon's judgment in

Marsh v. Hutchinson, 3 Bos. & Pul. 231.

<sup>g</sup> 2 Bos. & Pul. 233.

and separate maintenance, rendered the wife solely liable.

further. For the Court of King's Bench, in the case of *Corbet v. Poelnitz*,<sup>h</sup> held, that she might be considered as sole, not only when her husband was resident beyond the seas, under the circumstances already mentioned, but also when he was within the kingdom, if she was living apart from him, and had a separate maintenance. And the reason given by the Court is this, that as the separate maintenance allowed by the husband discharges him from all liability to pay his wife's engagements, she must be liable for them, for that otherwise the creditor would not be paid by either. Besides, this liability was held to extend not only to her contracts for necessities, but to her contracts in general, and though she should have exhausted the whole fund provided for her. The Court, in deciding this case, relied upon two former cases, which had been determined in the same court before Lord Mansfield, viz. *Ringstead v. Lady Lanesborough*,<sup>i</sup> and *Barwell v. Brooks*,<sup>j</sup> where *feme covert*s were held to be liable, because they had a sufficient separate maintenance secured to them by their husbands. And although the cases of *Hutchett v. Baddeley*,<sup>k</sup> and *Lean v. Schutz*,<sup>l</sup> in which it was held that a *feme covert* was in no case liable, whilst her husband was resident within the kingdom, were cited and very much relied on, they seem to have made no impression on the Court. Indeed, in the case of *Cox v. Kitchen*,<sup>m</sup> Mr. Justice Rook extended the rule still further, for he stated it to be his opinion that a married woman, who lived separately from her husband, and in adultery, was on that ground alone liable to her own contracts, even though she had no separate maintenance. In this case the action was *assumpsit* for goods sold and delivered, and for work and labour done; the defendant pleaded the general issue, and at the trial it appeared that she was a married woman, who was then, and for some years preceding had been living in adultery. Mr. Justice Rook, who tried the case, directed the jury to

h 1 T. Rep. 5.

i Cooke's Bank. Law, 26.

j Ibid.

k 2 Sir W. Black. Rep. 1079.

l 2 Sir W. Black. Rep. 1195.

m 1 Bos. & Pul. 338.

find for the plaintiff, if they believed that the defendant lived in adultery when the contract was made; and the verdict was accordingly for the plaintiff. A motion having been afterwards made in the court of Common Pleas, on the part of the defendant, for a new trial, upon the ground that she had not been proved to have had a separate maintenance; it was refused, as no point had been saved at the trial, and as the verdict was with the justice of the case; but not one of the judges controverted the assertion of counsel, that the verdict was against law, because it did not appear that the defendant had a separate allowance.

It followed, as a necessary consequence from the doctrine, that separation and a separate maintenance rendered a married woman capable of binding herself by her contracts that she should be liable to a commission of bankrupt under such circumstances. And so it was decided by Lord Chancellor Apsley in *Ex parte Preston*.<sup>n</sup> In this case, Richard Fitzgerald, who had been a linen draper for some years, agreed upon a separation from his wife, and for that purpose articles were entered into between them and two trustees on her part; whereby Fitzgerald, in consideration of 600*l.* taken by him out of his own effects, assigned to the said trustees all his stock in trade, household goods, and all sums of money due to him, and the lease of his house, upon trust for his said wife, as her own separate estate. And it was thereby farther agreed, that she should have liberty of trading without any interruption from her husband, she paying all the debts then owing by him in trade, and maintaining their children, and saving him harmless from the same, and from all contracts and agreements to be thereafter entered into by her. The separation took place, and they ever afterwards lived separate, he having gone to the East Indies. The wife, after the separation, entered into trade, continuing in her husband's house, and there carried on the business of a linen draper, on her own account, and in her own name, nearly four years. During such

Held formerly that separation and separate maintenance rendered a wife liable to a commission of bankrupt.

trading a commission of bankrupt was taken out against her, when the commissioners refused to find her a bankrupt, because she was a *feme covert*, residing in the county of Middlesex, and not a *feme sole* merchant; trading in the city of London; but upon a petition to the Lord Chancellor, his Lordship ordered the commissioners forthwith to proceed to declare Mrs. Fitzgerald a bankrupt. This case was decided in the year 1772, and was the first in which it was held that separation and a separate maintenance rendered the wife solely liable for her engagements. It does not appear that his Lordship expressly laid down this proposition; it is rather to be inferred that he considered a *feme covert*, under such circumstances, as liable to a common law execution for her debts, and therefore liable to a commission of bankrupt, which is a statute execution.

Wife living  
in adultery  
not liable  
for her  
contracts.

However, from the first moment that Lord Kenyon sat in the Court of King's Bench, his Lordship struggled to narrow this liability of a married woman, until at last he succeeded in establishing, that, in no case was she liable during the coverture, so long as her husband resided within the kingdom. In *Gilchrist v. Brown*,<sup>o</sup> his Lordship held that the wife, though living in adultery, was not liable to her own contracts, when she had not a separate maintenance. The action was for goods sold and delivered, &c. and the defendant having pleaded coverture, the plaintiff replied, that defendant had committed adultery, and was separated from her husband; and this replication having been demurred to, the Court allowed the demurrer, saying that the replication could not be supported, for that it was destitute of the principle on which all the late decisions had proceeded, in which it was held that a *feme covert* might be sued as a *feme sole*, namely, a separate maintenance. In a subsequent case, the same Court, the King's Bench, decided, that a mere temporary separate provision to a wife living apart from her husband, would not render her personally responsible for her engagements; for in



*Ellah v. Leigh*,<sup>p</sup> where an action was brought against a married woman for use and occupation, the plaintiff having replied to the plea of coverture, that the defendant and her husband were separated, and that she had alimony allotted to her by the spiritual court during the continuance of a suit which was instituted in that court between her and her husband; this replication was held to be bad on demurrer, because the maintenance was not permanent. It is not however to be inferred from these two decisions of the King's Bench, that the Court considered that a separate maintenance would render a married woman liable for her debts, as the cases prove nothing more than this, that their Lordships were of opinion that there being no separate maintenance in the one case, and only a temporary maintenance in the other, they did not come within the principle of the authorities deciding that a separate maintenance would produce a separate liability. So far from entertaining an idea that a separate maintenance could make her liable, Lord Kenyon, on the contrary, never omitted an opportunity of exclaiming against the doctrine, that a *feme covert* could, under any circumstances, be responsible, if her husband were living within the realm. In *Clayton v. Adams*,<sup>q</sup> it was ruled, that the executor of a married woman, who lived apart from her husband, and carried on trade, was not liable for her debts, though he had possessed himself of her effects; Lord Kenyon saying, that, "We must not, by any whimsical conceits supposed to be adapted to the altering fashions of the times, overturn the established law of the land; it descended to us as a sacred charge, and it is our duty to preserve it. And if any one proposition in the law can be more clear than another, it is this, that an action cannot be brought against a *feme covert*, except by the custom of London." His Lordship accordingly seized upon the first occasion that offered of overruling the cases of *Corbet v. Poelnitz*,<sup>r</sup> and the other authorities connected with it: and this opportunity occurred

Wife separated from her husband, not liable for her contracts, having alimony, pending a suit.

p 5 T. Rep. 679.  
q 6 T. Rep. 604.

r 1 T. Rep. 5.

in the case of *Marshall v. Rutton*,\* where the very point was raised, whether a married woman living apart from her husband, and having a separate maintenance from him, could be made liable for her own engagements; and by the decision of this question the old law is now restored, and married women are remitted to their ancient disability of making themselves responsible during the residence of their husbands within the kingdom.

Wife cannot be made legally responsible for her contracts, by any agreement between her and her husband.

In *Marshall v. Rutton*, the action was assumpsit brought by John Marshall against Mary Rutton, to which the defendant pleaded her coverture with one Isaac Rutton, who is still alive. To this the plaintiff replied, that before the making the promises of the defendant, she and her husband had mutually covenanted to live separate and apart; that a separation accordingly took place between them, and that they have continually from thenceforth lived and still live separate and apart; that a competent and separate maintenance, suitable to the estate and degree of the defendant, of 200*l.* per annum, was in due form of law secured to her by deed, during the joint lives of herself and her husband, which has been duly paid to her, and that the promises in the declaration were made subsequent to the separation of her and her husband. The rejoinder admitted the separation between defendant and her husband, and stated that the deed mentioned in the replication was a deed of articles of separation, whereby it was provided, that the separate maintenance should be paid for such time only as the defendant should suffer her husband to live apart from her, and the defendant should maintain a chaste and becoming conduct, and should support their two youngest children; concluding with a traverse, that the separate allowance was secured to her during the joint lives of her and her husband. The plaintiff having cravedoyer of the articles of agreement, demurred, and the defendant joined in demurrer. This case was twice argued before all the judges, and Lord Kenyon, having stated the

question arising on the record to be, whether by any agreement between a man and his wife, she may be made legally responsible for the contracts she may enter into, and be liable to the actions of those who may have trusted to her engagements, as if she were sole and unmarried, declared their unanimous opinion to be, that the action could not be supported. This case seems to have settled the law upon the subject; the subsequent cases of *Marsh v. Hutchinson*,<sup>t</sup> *Chambers v. Donaldson*,<sup>u</sup> and *Bogget v. Frier*,<sup>v</sup> were decided in conformity with it, and upon its authority.

*Marsh v. Hutchinson*, and *Bogget v. Frier*, have been already stated as instances, where a married woman was held to be incapable of being sued, or of suing as a *feme sole* during the voluntary absence of the husband beyond the seas. In *Chambers v. Donaldson and others*,<sup>w</sup> the plaintiff's wife was living apart from him, under a sentence of separation, with alimony allowed, *pendente lite*. in the ecclesiastical court; and during that time the defendants broke and entered her house and took away her goods, for which an action of trespass was brought by her in her husband's name, as for breaking his house and taking his goods; on which a rule nisi was obtained for staying the proceedings, and making the plaintiff's attorney pay the costs, upon an affidavit of the husband himself, stating that the action had been commenced in his name without his authority. This rule was afterwards discharged, on the ground that, if the husband was unwilling that the action should proceed, he had the remedy in his own hand by releasing it; Lord Ellenborough observing, that it was evidently a collusion of the defendants with the husband to defeat the action in the only form in which, under the unfortunate circumstances of the case, the wife could protect herself. As this action was brought in the husband's name, it must have been considered at that period as settled law, that separation and a separate maintenance had not the effect of

<sup>t</sup> 2 Bos. & Pul. 226.

<sup>u</sup> 9 East, 471.

<sup>v</sup> 11 East, 301.

<sup>w</sup> 9 East, 471.

removing the disability of a married woman to maintain an action in her own name

By the custom of London, a *feme covert*, being a sole trader, is capable of binding herself by her contracts.

The custom of London furnishes another exception to the law, which renders a married woman incapable of binding herself by her contracts. The custom is thus stated:<sup>x</sup> "Where a *feme covert* of a husband, useth any craft in the said city on her sole account, whereof the husband meddleth nothing, such a woman shall be charged as a *feme sole* concerning every thing that toucheth the craft; and if the husband and wife shall be impleaded, in such case the wife shall plead as a *feme sole*; and if she is condemned, she shall be committed to prison, till she has made satisfaction, and the husband and his goods shall not, in such case, be charged or impeached." According to this custom, the craft must be used in the city, and on the sole account of the wife. If it appear that the wife was acting in the trade merely as the servant of her husband, or that he in any way interfered in it, the case is out of the custom. In *Lungham v. the Wife of John Barrett*,<sup>y</sup> upon a habeas corpus to remove the body *cum causa* of the wife of Barrett, it was returned, that an action of debt was brought against her and her husband, in London, as a *feme sole* merchant, for wares bought by the wife, wherein the husband is only joined for conformity, and by the custom the execution should be only against her. Two of the Judges, Richardson and Yelverton, were of opinion, that the wife should be discharged; because, when it appears that she used the same trade which her husband used, she is in law but servant to her husband, and the wares coming to his use, he, by intendment, is to be sued. And they construed the custom to mean, where the wife uses one trade and the husband another, and doth not meddle with the wife's trade, nor the wife with his. But Hutton, Harvey, and Croke, were of opinion, that as the return of the writ was, that she was sued in London as a *feme sole* merchant, according to

<sup>x</sup> 3 Burr. 1776. 1 Black. Rep. 570.  
<sup>y</sup> Crok. Car. 68.

the custom of London, it was a cause of which the court ought not to take cognizance; for in London they are judges of their own customs, and by intendment will proceed in their courts there according to their custom, and not otherwise. And besides that, although the wife used the same trade that her husband had used, yet because at the time of the contract the husband did not meddle with the trade, but she alone used it, it is no reason to accept bail, where an action cannot be grounded upon that contract in this court, but to remand the cause. Although this matter was afterwards compromised, it appears to have been admitted on both sides, that the trading must be in the city, and solely by the wife, without the interference of the husband, to constitute a case within the custom, and that the wife alone shall be taken in execution. An action on this custom can be brought only in the city courts, but the custom may be pleaded in bar in the superior courts.<sup>z</sup> But though the wife alone can be taken in execution, the husband must be joined in the action for conformity.<sup>a</sup> A married woman, who has carried on trade as a *feme sole* trader in the city of London, has been considered so far as distinct and separate from her husband, that when, after her death, he made a promise to pay for goods furnished to her for the purposes of her trade, the promise was held to be void, as having been without consideration, it being a debt for which he was not liable.<sup>b</sup> But, if it had appeared that she had acquired any property as such trader, of which the husband had possessed himself; perhaps the decision would have been for the plaintiff, the husband being liable in such a case as administrator of his wife. And accordingly, where an action was brought by a widow, in her own right, in one of the superior courts at Westminster, for goods sold by her as a *feme sole* trader, while she was *covert*; it was decided, that she could not maintain the action, and that it ought to have been brought by the representatives of the husband, because, if he had

Husband must be joined in action by the wife, founded on the custom

<sup>z</sup> 5 Com. Dig. 14. 3 Burr. 1784.  
<sup>a</sup> Beard v. Webb, 2 Bos. & Pul. 93.

<sup>b</sup> Fabian v. Plant, 1 Shower. 183.

The custom operates on simple contracts only.

A feme covert, sole trader in the city of London, liable to bankrupt laws by the custom.

been alive, he should have joined in the action.<sup>c</sup> In like manner, where a *feme covert* sole trader gave a warrant of attorney to enter up judgment on a bond, which she had executed as a sole trader, and on which execution had issued; the judgment was set aside, because the husband was no party to it.<sup>d</sup> Lord Mansfield held, in this case, that a *feme covert* sole trader cannot execute a bond; that she is liable for simple contracts only, and cannot give a bond; for, if she could, she might bind her heirs, which no custom can warrant. And Mr. Justice Aston observed, that the custom seemed to operate on simple contracts only.

A *feme covert* sole trader in London has also been held to be liable to the operation of the Bankrupt Laws, and her separate effects in trade may be seized and applied to the payment of her own debts contracted in such separate trade. In *Lavie and another, assignees, v. Phillips and others, assignees*,<sup>e</sup> an action of trover was brought by the assignees of Jane Cox, a sole trader in London, a bankrupt, against the assignees of John Cox, who was also a bankrupt. A verdict was found for the plaintiffs, subject to the opinion of the court on the following questions: First, Whether the assignees of the husband had a right to take the separate effects of Jane his wife, who was a sole trader, and apply them towards satisfaction of the debts of the husband, under the commission awarded against him, in prejudice of the separate creditors of his wife? Secondly, Whether a commission of bankruptcy may issue against a married woman, being a sole trader? And the Court decided that the husband's assignees could not apply the separate effects of the wife in satisfaction of his debts, because her separate effects are, in the first place, liable to her separate creditors; but, if they were liable to the husband's creditors, this would destroy the end of the custom. It was also decided, that she was liable to a commission as a neces-

<sup>c</sup> Caudell v. Shaw, 4 T. Rep. 361.

<sup>d</sup> Read v. Jowson, cited in Cau-

dell v. Shaw, 4 T. Rep. 361. Loft's Rep. 134.

<sup>e</sup> 3 Burr. 1776. 1 Sir W. Black. Rep. 570.

sary consequence of the custom, as otherwise she would be liable to perpetual imprisonment.<sup>f</sup> In this case, it was admitted by the judges in their arguments, that the husband had a right, as between her and himself, to seize her separate effects, and to prevent her separate trade in future, and that she had no remedy against him from the custom; but that he could not interfere with these effects so as to injure her creditors, who might follow the effects into the hands of the husband.

It would seem also, that an action brought against a *feme covert* and her husband on the custom of London, on the suggestion that she was a sole trader, cannot be removed from the Mayor's Court in London by *habeas corpus cum causa*.<sup>g</sup>

<sup>f</sup> See also 2 Black. Com. 477.

<sup>g</sup> Pope v. Vaux and wife, 2 Black. Rep. 1060.

## CHAP. V.

## OF THE ARREST OF MARRIED WOMEN UNDER MESNE AND FINAL PROCESS.

A married woman may be arrested on civil process, mesne or final.

A MARRIED woman, like any other individual, may be arrested on civil process directed against her ; but, as she is incapable of possessing property, it necessarily follows, that her arrest might lead to an imprisonment for life,<sup>a</sup> unless there existed a jurisdiction to relieve her, when the circumstances of her case would warrant its interference in her favour. For, if her husband be either not to be found, or, if there be a collusion between him and the plaintiff in the suit, her imprisonment might be extended to an indefinite period, as she might not have the means of discharging the debt, or of giving security for her appearance. Accordingly the courts of law have uniformly exercised a discretionary power of discharging her from custody, or of detaining her in it, as the peculiar circumstances might have required.

A married woman may be arrested either on mesne, or on final process, and she may be arrested either alone, as a *feme sole*, or as a married woman, either alone, or jointly with her husband.

Arrest of married woman, as a *feme sole*, irregular ; and she will be discharged, unless she has induced.

\*If an action be brought against a married woman, as a *feme sole*, and she be arrested on mesne process, such a proceeding would be manifestly irregular, but it would rest with the court to decide, whether they would interfere to cure the error by the discharge of the defendant merely on motion, or whether they would put her to plead her coverture in bar of the action. And the general course adopted



on this subject is, that she will be discharged on motion, unless she has induced the plaintiff to believe that she was an unmarried woman, either by her express declarations to this effect, or else by the nature of the transaction itself, which is the object of the suit. At one time it seems to have been considered necessary for the purpose of entitling a married woman to the benefit of this summary interposition of the court, that the fact of her marriage should have been notorious and easily ascertainable on inquiry,<sup>b</sup> but now the proof of her marriage by affidavit is sufficient to entitle her to her discharge. But if it appear that the defendant represented herself to be an unmarried woman, and thereby induced the plaintiff to give her credit, she disentitles herself by this fraud to her discharge, and will be left to her plea of coverture. As in *Partridge v. Clarke*,<sup>c</sup> where an application was made to discharge the defendant out of custody on common bail in an action of *assumpsit*, on the affidavit of the defendant that she was a married woman; and on the production of a copy of the register of her marriage, an affidavit was made by the plaintiff, in which he stated, that when the defendant applied to him for the loan of the money for which the action was brought, he objected to her the rumour of her being a married woman, which she positively denied. The Court discharged the rule, and refused to interfere in a summary way. In like manner, in *Luden v. Smith*,<sup>d</sup> where it appeared that the defendant had acted with duplicity towards the plaintiff, and that he did not know her to be a married woman until a great part of the debt had been incurred, and that at the time of the application she was residing in Scotland; the Court refused to cancel a bail-bond executed by her on her arrest, and to permit her to file common bail.

And if a married woman make herself a party to a negotiable instrument, that will be considered tantamount to a declaration by her that she is an unmarried woman, so that

<sup>b</sup> *Pearson v. Meadon*, 2 Black. Rep. 903.

<sup>c</sup> 5 T. Rep. 194.  
<sup>d</sup> 1 Bing. 344.

Not entitled to her discharge, if she be arrested as a party to a negotiable instrument.

if she be arrested by any one of the parties, who was ignorant of her marriage, she will not be discharged on common bail. As in *Prichard v. Cowlan*,<sup>e</sup> where a motion was made for a rule to show cause, why the bail-bond in this action should not be given up to be cancelled, on affidavit that the defendant was a married woman, that she had been arrested as the acceptor of a bill of exchange, drawn by one Manneville, and indorsed to the plaintiff, and that the drawer, when he drew the bill, knew the defendant was a married woman. Chief Justice Gibbs said, "But the drawer is to be supposed to have indorsed it over to the plaintiff for a valuable consideration. Is not this bill such a representation of the defendant as a single woman, as falls within the rule of this court, not to interfere, where a married woman has held herself out as single?" The rule was accordingly refused. In like manner, in *Jones v. Lewis*,<sup>f</sup> cause was shown against a rule obtained to discharge the defendant on entering a common appearance, on the ground that she was a married woman, which was sworn to by a third person. The affidavit on the part of the plaintiff stated that the action was on a bill of exchange drawn by defendant on one Palmer, who accepted it, and indorsed it to plaintiff. That plaintiff not being able to find the acceptor, applied to the defendant for payment, on which occasion she did not state herself to be a married woman. By the Court, "Under all the circumstances, we certainly will not discharge the defendant. She is the drawer of the bill, and she does not venture to swear that she is a married woman."

Will be discharged, where plaintiff knew at the time of contracting the debt that she was married.

But where it appears that the plaintiff knew the defendant was a married woman at the time of contracting the debt, she will be discharged on common bail; and it was so ruled in *Waters v. Smith*.<sup>g</sup> In this case it was contended for the plaintiff, that the ground of the application was, if true, a defence to the action, and that this was not the time

<sup>e</sup> 2 Marshall, 40.

<sup>f</sup> 2 Marshall, 385. <sup>g</sup> Taunt. 55.

<sup>g</sup> 6 T. Rep. 451.

for making such an objection. That coverture, like infancy, was a fact to be established by evidence, and that if the former were permitted to be gone into this stage of the proceeding, there was no reason why the latter should not also, and yet that had never been attempted. It was also sworn in support of the rule for the defendant's discharge, that the plaintiff knew she was a married woman at the time when the debt was contracted. *Per Curiam*, "Though, when a married woman imposes on a trader, and contracts on her own credit, we will not relieve her in a summary way, yet, according to the latest authority with which the Master has furnished us, where it has clearly appeared that the defendant was a *feme covert*, and there has been no contrariety of evidence about that fact, the Court has discharged her out of custody on filing common bail. Therefore, let the rule be made absolute." So in *Wardell v. Gooch*,<sup>h</sup> where an application was made that the defendant should be discharged out of custody on filing common bail, on an affidavit that the plaintiff knew the defendant was a married woman at the time the debt was contracted. The rule was opposed, on the ground that the defendant was living apart from her husband at the time, and had a separate maintenance. But Lord Ellenborough said, that he saw no objection to relieving her in this summary way, the plaintiff having dealt with her, knowing her to be a married woman. And in *March v. Capelli*,<sup>i</sup> a similar application had been granted, where the plaintiff knew at the time of the credit given to the defendant, that she had a husband living abroad, though under terms of separation from her.

Entitled to her discharge, plaintiff knowing her to be married when the debt was contracted, though she lived from her husband, and had a separate maintenance.

And a married woman will not only be discharged, when it appears that the plaintiff knew she was married before he had her arrested, but he will be obliged to pay the costs of the application, notwithstanding she had contracted the debt as a *feme sole*, and though when she did

<sup>h</sup> 7 East, 582. 3 Smith's Rep. 576.

<sup>i</sup> Note (a) to Pitt v. Thompson, 1 East, 17.

To entitle a married woman to her discharge, it is sufficient that she has not practised any deception.

disolose the fact of her coverture, she stated that she was separated from her husband, and had estates settled to her separate use, and was liable for her own debts, and actually gave a bill of exchange for the amount of the debt.<sup>j</sup> But now it is not necessary to entitle a married woman to be discharged out of custody on mesne process, that the plaintiff should have known that she was married; it will be sufficient that she had not practised any deception on the plaintiffs by representing herself as a *feme sole*. In *Collins and Another v. Rowed*,<sup>k</sup> the application was, that the bail-bond should be delivered up to be cancelled on entering a common appearance, upon affidavit that the defendant was a married woman when the debt was contracted, and that her husband was still living. The motion was resisted by the plaintiff, who swore that he had no knowledge of the defendant's coverture, and that she appeared as a *feme sole*, and carried on business as a milliner in St. Alban's Street, and that he trusted her as a *feme sole*; and that since the contracting of the debt, she had made several promises to pay, and offered another person's security. The Court said, "that it was not now the practice to refuse to discharge a married woman, merely because her coverture was not notorious, and the plaintiff had trusted her as a *feme sole*; that if a woman deceives the plaintiff with respect to her; condition by a falsehood, the Court will not discharge her, but that in the present case, as the defendant had not used any deceit by representing herself as a *feme sole*, she was entitled to be discharged." And this seems to be the rule at present, even where the defendant is arrested as the drawer of a bill of exchange. In *Samwell v. Jenkins*,<sup>l</sup> the defendant, a married woman, on the arrest of her husband, drew a bill of exchange, not representing to the plaintiff or to any other person that she was a *feme sole*, and having been afterwards arrested, and having given bail to the sheriff, the Court, on motion, directed the bond to be given up to be cancelled. And even where the defendant

<sup>j</sup> Wilson v. Serres, 3 Taunt 307.  
<sup>k</sup> 1 New Rep. 54.

<sup>l</sup> 6 Moore, 500.

did inform the plaintiff that her husband was dead, under the erroneous impression that the fact was so, the Court discharged her. It appeared in the case of *Pitt v. Thompson*,<sup>m</sup> that the defendant had been the tenant of a house for several years previous to 1796, for which her husband, a seafaring man, had paid rent; that at that period she informed the plaintiff that she believed her husband was dead, and desired to continue tenant of the premises, to which he had assented. An arrear of rent becoming due, the plaintiff arrested her for it, and on a motion for her discharge, it was now sworn that the husband was alive. The Court thought "that the defendant was entitled to the relief prayed, considering her as having made the representation of her husband's death to the plaintiff through mistake, and not from any intention to impose upon him."

Not disentitled to her discharge by an untrue representation unintentionally made.

However, to entitle a married woman to her discharge from an arrest on mesne process on the ground of her coverture, is it necessary that the affidavit should be positive, that she is married. If it be sworn that she was a married woman, "as by the certificate annexed will appear," it will be insufficient.<sup>n</sup>

Affidavit of her being a married woman must be positive.

Even when a married woman has been separated from her husband by a divorce, *mensâ et thoro*, the bail-bond given for her appearance shall be cancelled, and she shall be permitted to file a common appearance. As in *Hookham v. Chambers*,<sup>o</sup> where the Court so ruled it on the principle, that a married woman is not solely liable during the continuance of the marriage.

Married woman separated, *a mensa et thoro*, will be discharged.

But, though the plaintiff be aware of the coverture of the defendant at the time he contracts with her, still if her husband be a foreigner residing abroad, and she be a foreigner residing in England, and if she trade with the plaintiff on her own account, and be arrested by him, the Court will not discharge her on common bail, but will leave her to her plea of coverture.<sup>p</sup> And, in like manner, where

Wife of foreigner residing abroad not entitled to her discharge, she being a foreigner trading and residing in England.

<sup>m</sup> 1 East, 16.

<sup>n</sup> *Harvey v. Cooke*, 5 Barn. & Ald. 747.

<sup>o</sup> 3 Brod. & Bing. 92.

<sup>p</sup> *De Gaillon v. L'Aigle*, 1 Bos. & Pul. 8.

Wife of foreigner residing abroad not entitled to her discharge, though she be not a trader in England.

the defendant was a foreigner residing in England, her husband a foreigner residing abroad, the Court refused to discharge her, though she was not a trader, and had not been guilty of any misrepresentation. As in *Burfield v. Duchesse de Pienne*<sup>p</sup>, where a motion was made for a rule to show cause why the defendant, who had been arrested, should not be discharged on a common appearance. The affidavit stated that defendant was married to the Duc de Pienne; that they came over to England in consequence of the troubles in France, and resided here till 1803, when the Duke went to Warsaw to attend Louis XVIII. as lord of the bed-chamber; that the defendant remained in England for her personal safety, with the consent of her husband, with whom she constantly corresponded; that she had always gone by the name of the Duchesse de Pienne; that she was never separated from her husband by any deed, nor had any separate maintenance; that she had never represented herself as a single woman; that she believed the plaintiff knew her to be a married woman at the time when the debt was contracted; and that, for aught she knew, the Duke might speedily return to England. *Pitt v. Thompson*,<sup>q</sup> *March v. Capelli*,<sup>r</sup> and *Marshall v. Rutton*,<sup>s</sup> were cited in support of the motion, but it was refused, the court distinguishing *Pitt v. Thompson* from the principal one, by the circumstance that the defendant was in the former case an English woman, and saying, that if the counsel would distinguish this case from *Dearly v. The Duchess of Mazarine*,<sup>t</sup> it might be moved again.

Married woman, arrested for penalties incurred for insuring in the lottery, discharged.

The preceding cases are instances of the arrest of married women on mesne process for their contracts. It seems that if a married woman violate a penal statute, and be arrested for the penalty, she will be discharged on common bail. In *Pritchett qui tam. v. Rachael Cross*,<sup>u</sup> the defendant was arrested and holden to bail for penalties incurred by

p 2 New Rep. 380.

q 1 East, 16.

r Note (a) to *Pitt v. Thompson*,  
1 East, 16.

s 8 T. R. 545.

t 2 Salk. 646.

u 2 Hen. Black. 17.

insuring tickets in the Irish lottery. On a motion for a rule to show cause why she should not be discharged on entering a common appearance on two grounds; 1st, the insufficiency of the affidavit; 2dly, because the defendant was a married woman; the objection to the affidavit the court held to be of no weight; but on the second objection they made the rule absolute, being of opinion that the coverture was a good reason to discharge her. But as the reporter observes, Justice Goold seemed to disapprove of the summary proceeding by motion, and of taking the fact of coverture from the defendant's affidavit. And he said he always understood it to be the practice of the Common Pleas and the King's Bench not to be satisfied with an affidavit, but to put the defendant to plead coverture.

As a *feme covert* who has contracted debts in the assumed character of a *feme sole*, and has been arrested as such under mesne process, will not be discharged on motion, so if she execute a warrant of attorney to enter upon a judgment against her, which is in effect a representation that she is unmarried, and if the judgment be accordingly entered and execution be issued thereon, the Courts will neither set aside the judgment nor will they discharge her from the execution on motion, although a writ of error would lie. In *M'Lean v. Douglas*,<sup>v</sup> a motion was made for a rule to show cause, why the judgment in this case, which had been entered up by virtue of a warrant of attorney given by a *feme covert*, should not be set aside. Serjeant Bayley stated that the judgment had been entered up more than a year, and observed that as it might be clearly set aside upon a writ of error, the Court might perhaps grant relief in this stage of the proceedings, in order to avoid putting the defendant to unnecessary expense. But the Court refused to grant a rule, and Justice Chambre said, that he remembered a case in which he had moved the Court of King's Bench for leave to plead coverture in abatement, after the regular time for

When a married woman executes a warrant to enter up a judgment, it will not be set aside.

A married woman, who has executed a warrant to enter judgment, will not be discharged from an execution issued upon it.

pleading in abatement had elapsed, stating that the matter for which he applied for leave would afford ground for a writ of error, and consequently that if the action were suffered to proceed, the judgment might be reversed ; but the Court refused a rule to show cause, and the judgment was afterwards reversed for ever. In like manner, in the case of *Wilkins v. Mary Wetherill and Charlotte Coutts*," on a motion for a rule to show cause why the judgment signed in this case against Charlotte Coutts, one of the defendants, and the writ of execution issued thereon, should not be set aside for irregularity, and the sum of 42*l.* 17*s.* 6*d.* levied thereon, be restored to her. The ground of the application was, that the judgment was entered up on a warrant of attorney given by Charlotte Coutts jointly with Mary Wetherill, the other defendant, the former being a *feme covert* at the time when the warrant was given. It appeared from the affidavits that Mary Wetherill, who was a widow, and the mother of Charlotte Coutts, having been arrested for a debt, the latter joined with her in a warrant of attorney, in order to obtain her mother's discharge ; that the plaintiff was not apprised Charlotte Coutts was a *feme covert*, and that having entered up judgment on the warrant of attorney, C. Coutts was taken in execution, whereupon her husband paid the debt. It was contended that C. Coutts, being a *feme covert*, her deed was absolutely void. The Court refused the rule, saying that the plaintiff was not apprised that Charlotte Coutts was a *feme covert* at the time the warrant was given, and that it had been repeatedly decided that the Court would not assist a *feme covert* in a summary way, who obtained credit by acting as a *feme sole*; and therefore that C. Coutts must proceed by her writ of error.

Where wife alone has been arrested on mesne process against

The preceding cases afford instances of the arrest of married women, where the proceedings have been against them alone as *femes sole* ; but where the action has been brought against a married woman, as such, jointly with her husband,



and the wife alone has been arrested on mesne process, she shall always be discharged. In an anonymous case in Cro. Jac.,<sup>x</sup> it appears a *latitat* was sued out against husband and wife, on which the wife was arrested, but the husband could not be found. The sheriff returned *cepi corpus* for the wife, and *non est inventus* for the husband. The question was, what should be done in this case ; and it was held by the court, that nothing could be done, unless there were bail put in by the husband ; for the wife, without the husband, cannot be sued, nor can put in bail ; and against the husband, unless he be first taken and put in bail, there cannot be any declaration ; and therefore, in regard the plaintiff cannot declare, the wife was dismissed. So, where in an action of trover against husband and wife, the wife was arrested on mesne process, Justice Twisden said, the wife must be discharged on common bail.<sup>y</sup> And in *Cornish v. Marks*,<sup>z</sup> it was held, that if a *feme covert* be arrested, let the cause of action be what it-will, she shall be discharged on common bail ; but if the husband be arrested, he shall not be discharged by giving bail for himself, without giving bail for his wife also. So where a writ was sued out against husband and wife, which was returned *non est inventus* as to the husband, and the wife was arrested, she obtained a rule to show cause why she should not be discharged. It was contended for the plaintiff, that as the husband could not be found, this was the only remedy which the plaintiff had, and that the defendant's wife had little reason to make this application, since the suit had been instituted to recover a debt due from her before the marriage. Justice Ashhurt said, "There are many authorities in favour of this application, and none against it, and the cases go with the reason of the thing ; for a *feme covert* has no property of her own, and if it were permitted to arrest her, she might be imprisoned for life."<sup>a</sup>

husband  
and wife,  
she shall  
be dis-  
charged.

<sup>x</sup> Cro. Jac. 445.

<sup>y</sup> Anon. 1 Mod. 8.

<sup>z</sup> 6 Mod. 17.

<sup>a</sup> Edwards v. Bourke and wife, 1 T. Rep. 486.

If wife alone be arrested on mesne process against husband and wife, she shall be discharged on common bail.

But it seems that, in such a case, common bail must be filed for the wife, as Lord Holt stated the law to be, when it was asserted at the bar on the authority of the above anonymous case, in Croke Jac.,<sup>b</sup> that if there be process against baron and feme, and *non est inventus* for the baron, and a *cepi corpus* as to the feme, she should be discharged. No, said Lord Holt, she shall not be discharged, but upon common bail, and then new process shall go against the baron, with an *idem dies* given to the wife.<sup>c</sup> And in another case,<sup>d</sup> Justice Twisden observed, "where it is said in Croke that the wife in such case shall be discharged, it is to be understood that she shall be discharged on common bail."

So if in an action against husband and wife, the husband is outlawed and the wife waived, and she is taken on the *capias utlagatum*, though she is to be discharged of the imprisonment, because the plaintiff cannot proceed against her alone, yet she still continues waived; and when her husband is taken, he must bring her in.<sup>e</sup> And in *Crookes v. Fry and Wife*,<sup>f</sup> where the wife alone was arrested on mesne process against husband and wife for a debt contracted by her before marriage, she was discharged out of custody on filing common bail, though the husband had absconded.

Where both husband and wife taken on mesne process, she will be discharged, and he must put in bail for both.

If the process be against husband and wife, and he be arrested alone, the bail may justify for him only, but he must find common bail for his wife.<sup>g</sup> Where both husband and wife were taken on mesne process, it was held at one time, that if he put in bail for himself, he must put in bail for his wife also; but if he be in prison, his wife cannot be let out on common bail.<sup>h</sup> But the law now seems to be, that where both are taken on mesne process, she will be discharged, and the husband must lie in prison, till he

<sup>b</sup> Cro. Jac. 445.

<sup>c</sup> 1 Salk. 115.

<sup>d</sup> Anon. 1 Mod. 8.

<sup>e</sup> 3 Bac. 751. Dyer, 271 b.

<sup>f</sup> 1 Bar. & Al. 165.

<sup>g</sup> Coulson v. Scott, 1 Chit. Rep. 75.

<sup>h</sup> Anon. 1 Vern. 49.

puts in bail for both.<sup>i</sup> And where, after judgment against husband and wife for a debt contracted by her *dum sola*, they were both rendered to prison in discharge of their bail, it was moved that she should be discharged out of custody on common bail. The Court held, that husband and wife being rendered to prison in discharge of their bail, were in the same situation as if bail had never been put in for them, and so were really in prison for want of bail to the first process, and not being charged in execution, the wife must be discharged out of prison. And Chief Justice Wilmot, on the same occasion, cited a manuscript case, where it was solemnly settled, on argument, that on a taking on mesne process, a *feme covert* shall always be discharged.<sup>j</sup> However, this position does not seem to have been attended to in *Robarts v. Mason and Wife*,<sup>k</sup> where husband and wife were both arrested on mesne process, and the Court refused to discharge her on common bail, and held that the husband should put in special bail for both. This case was decided in the Common Pleas; but in *Crooks v. Fry and Wife*,<sup>l</sup> Justice Bayley stated it to be the constant practice of the Court of King's Bench to discharge the wife, where husband and wife are arrested on mesne process, and to refuse the discharge of the husband, unless he put in bail for both. And in a subsequent case in the same Court, where husband and wife were arrested on mesne process for her debt contracted while she was sole, and she was let out of custody on giving bail, it was ordered on motion that the bail-bond should be delivered up to be cancelled, but without costs; Justice Bayley saying, it was not a case for costs, as many persons might doubt whether the wife was not also liable to be arrested with her husband for a debt contracted by her when sole. His Lordship also stated the rule to be, that if both hus-

Where husband and wife arrested on mesne process, the Court of C. P. will not discharge either until special bail put in for both.

King's Bench discharges wife, and detains husband, until bail put in for both.

<sup>i</sup> Harrison v. Bearcliffe and Wife, 2 Strange, 1272. 1 Barn. & Ald. 165.

<sup>j</sup> Anon. 3. Wilson, 124. Reported also in 2 Sir W. Black. 720, under

the name of Roberts v. Andrews and wife.

<sup>k</sup> 1 Taunt. 254.

<sup>l</sup> 1 Barn. & Ald. 165.

band and wife are arrested, she is entitled to be discharged, the husband putting in bail for both.<sup>m</sup> And accordingly, in the subsequent case of *Cattarns v. Player and Wife*,<sup>n</sup> where husband and wife were arrested on bailable process, and he did not put in bail for both, but remained in custody, the wife was discharged on common bail. The only question in this case was, whether the declaration, being against the husband alone, was a regular proceeding, the wife being discharged on common bail. And the Court held that it was not, for the wife was in the eye of the law in custody, though only common bail was filed, and that if two be arrested, a declaration cannot be filed against one only.

Married woman arrested on final process with or without her husband, not discharged.

Such is the state of the practice respecting the discharge of married women from custody, where they have been arrested on mesne process, either without or with their husbands. But if a married woman be arrested either with or without her husband on final process, it is not the practice of the courts to discharge her. And first where the judgment and the execution are against the wife alone as a *feme sole*, she will not be discharged on motion. As in *Cooper v. Hunshin*,<sup>o</sup> where an interlocutory judgment having been obtained against the defendant when sole for goods sold, she married before final judgment, which the plaintiff's attorney entered, and issued execution upon it, and arrested the defendant, notwithstanding he had been informed by notice of her marriage. And on a motion to set aside the *capias ad satisfaciendum* on the ground of irregularity, the Court refused to do so, because the judgment being against the *feme* only, the execution can be only against her. In like manner, where a *feme sole* had given a warrant of attorney, and afterwards married during the same term, and was taken in execution on a judgment signed as of that term, and therefore having relation to the first day of term, it was held that she could not be relieved.<sup>p</sup> And even

<sup>m</sup> Taylor v. Whitaker and Wife,  
2 D. & Ry. 225.  
<sup>n</sup> 3 D. Ry. 247.

<sup>o</sup> 4 East, 521. 1 Smith's Rep. 282.  
<sup>p</sup> Triggs v. Triggs, Man. Exch.  
67, 68. Tidd's Prac. 196. edit. 8.

where a woman had married before any judgment had been entered, but after verdict against her, still a subsequent judgment and execution against her alone by her maiden name had been held to be valid. As in *Doyley v. White*,<sup>q</sup> where an action of trespass had been brought against a woman, who, pending the suit, married. A judgment in the same cause was had against her after her marriage by her maiden name, and an execution was issued against her by the same name, which was executed by the defendant, as sheriff. An action was brought against him by the husband for this arrest of his wife, to which he pleaded in justification, that at the time of the action brought against her, she was unmarried. There was a demurrer to this plea which was adjudged for the defendant, the whole Court being of opinion that if an action be brought against a woman, who is found guilty, and before judgment takes husband, that the capias shall be awarded against her and not against her husband; and in this case of her subsequent marriage, (her husband not being so much as once named in any part of the record,) if the sheriff had returned that she was now married, he would have falsified all the proceedings, and therefore they resolved that the action was not maintainable.

So if the judgment and execution be against husband and wife, and she alone be arrested, the court will not discharge her. As in *Pitts v. Meller*,<sup>r</sup> where in trover and judgment against husband and wife, and execution against both, the Court refused to discharge her out of custody, unless it could be shown that there was collusion between the plaintiff and the husband to keep her there. So in *Finch and Wife v. Duddin and wife*,<sup>s</sup> where in an action for a battery of the plaintiff's wife by the defendant's wife, there was judgment for the plaintiffs, and the wife of the defendant was alone taken in execution. She moved to be discharged, but upon affidavits of endeavours to take the husband; and it not appearing there was any design to screen him, the

Where execution is against husband and wife and she alone is arrested.

q Cro. Jac. 323.  
r 2 Str. 1167.

s 2 Str. 1237.

court refused it on the authority of the preceding case. In like manner, in *Wilmot v. Butler and wife*,<sup>t</sup> the latter was in custody under a *ca. sa.* which issued upon the judgment had against both; and on a motion to discharge her, it was refused, the court stating the rule to be, that if a wife be in custody upon mesne process, which issued in an action against her and her husband, she is entitled to her discharge; but that if she be in custody under a *ca. sa.* which issued against her and her husband, she is not entitled to a discharge, unless it appear that her being in custody is the consequence of some fraud or collusion between the plaintiff and her husband, for that execution must always follow the judgment. And in a late case, *Chalk v. Deacon and wife*,<sup>u</sup> where the wife was arrested alone on a writ of *ca. sa.* issued on a judgment against her husband and wife, the court refused to discharge her. It was contended in support of the rule for her discharge, that it is the practice at present to discharge a *feme covert*, when taken in execution, as well as on mesne process; but the court said, that applications of this kind are in the discretion of the court, who are to exercise it justly according to the peculiar circumstances of the case before them. The same party afterward applied to the Court of King's Bench for a mandamus to the commissioners of the insolvent court, who had refused to discharge her as an insolvent; and the court refused the application, being of opinion with the commissioners, that a married woman, who, with her husband, is in execution for a debt contracted before her marriage, is not entitled to be discharged under the insolvent debtors' act, because she is incapable of executing a warrant of attorney, and complying with the other terms required by that act.<sup>v</sup>

Where husband and wife taken in execu-

So where the husband is arrested with his wife, she will not be discharged. In *Berriman v. Gilbert and wife*,<sup>w</sup> the court refused to discharge the wife, who had been taken in

<sup>t</sup> Sayer's Rep. 149.  
<sup>u</sup> 6 Moore, 128.

<sup>v</sup> Ex parte Deacon, 5 Barn. & Ald. 759.  
<sup>w</sup> Barnes, 203.

execution with her husband for a debt contracted by her whilst sole, and it was then said that no instance could be shown where a married woman had been discharged from an execution. So in *Langstaff v. Rain and Wife*,<sup>x</sup> where the action was for an assault and battery by the defendant's wife, and a verdict and judgment had for the plaintiff, the defendants, husband and wife, were both taken in execution, and the court refused to discharge her.

tion, she will not be discharged.

There is only one instance in which a married woman has been discharged, as such, where she and her husband have been in custody under an execution. In *Lady Chaworth's case*,<sup>y</sup> her husband had confessed a judgment against himself and his wife, as for a debt contracted by her whilst sole, whereas it appeared on inquiry that the debt had been incurred during the coverture, and that it had been made the pretext for taking the wife in execution. But it appearing that the husband also had been arrested, the wife was discharged, for the husband being in execution, the wife should be in custody also, even supposing the contract to have been made before marriage. But the court said, that as this matter had been effected by artifice, if it could be shown who were guilty of it, they would wish to punish them. However, the authority of this case has been since denied.<sup>z</sup>

If wife arrested on final process by contrivance, she will be discharged.

The summary of the cases on this point of practice is this, if a married woman be sued as a *feme sole*, she will be discharged from an arrest on mesne process, unless it appears that she has represented herself to be a *feme sole*, or has done some act amounting to such a representation. But where she has given a warrant of attorney to confess a judgment as a *feme sole*, she will not be discharged from an execution issued upon that judgment. If a married woman be sued as such jointly with her husband, and be arrested alone on mesne process issued against both, she will be entitled to be discharged from custody, or if she be arrested on similar process with her husband, she will still be dis-

<sup>x</sup> 1 Wils. 149.  
<sup>y</sup> 1 Lev. 51.

<sup>z</sup> *Harrison v. Bearcliffe and wife*,  
2 Str. 1272.

charged ; but the husband must remain in custody, until he puts in special bail for both. And, lastly, if a married woman be arrested on final process, issued against husband and wife, either alone or with him, she shall not be discharged, unless there be some collusion between the plaintiff in the suit, and the husband, to detain her in custody.



## CHAP. VI.

## OF THE WIFE'S INTEREST IN HER OWN PERSONAL PROPERTY, AND IN THE PERSONAL PROPERTY OF HER HUSBAND AFTER HIS DECEASE.

It has been already shown that a married woman can have no property during her coverture, except where her husband has undergone a civil death. However, this disability terminates with her husband's life, for so soon as the coverture is at an end, her rights, not only with respect to her own property, which were dormant during the marriage, revive and come into being, but she acquires in her new character of widow, interests in her husband's property, which she had not before, unless they have been limited or surrendered by some settlement previous to the marriage.

Interest of widow in her own and husband's personality.

And, first, with respect to her interest in her own property after her husband's decease. As to the wife's real property, her estates of inheritance and of freehold, which have not been the subject of settlement, they undergo no change by the marriage, and, on the death of the husband, they continue hers, as before it, with the restoration of all those powers of disposition which the coverture had suspended.

The wife's chattels real, that is, her terms for years, not being, like chattels personal, and absolute to the husband by the marriage, survive to her, unless he have (as he may) disposed of them in his lifetime.<sup>a</sup> And if the husband should aliene part of her term, the remainder will survive to her.<sup>b</sup> She and her husband may be joint tenants for years,<sup>c</sup> and if she survive, she will necessarily take the entire.<sup>d</sup>

The chattels real of the wife survive to her, unless disposed of by the husband.

<sup>a</sup> Co. Lit. 46 b. 351 a.

<sup>b</sup> Co. Lit. 46 b. Cro. Eliz. 33.  
279.

<sup>c</sup> 1 Roll. Ab. 343.

<sup>d</sup> 1 Roll. Ab. 349. 2 Com. Dig.

Wife takes  
by sur-  
vivorship  
arrears of  
rent due on  
lease  
made by  
her before  
marriage,  
and on  
leases  
made of  
her lands  
by her  
and her  
husband.

The wife shall have also by survivorship, the arrears of rent due under leases made by her of her own lands prior to her marriage. As if she lease for life or years, and marry, she shall have the arrears of rent after her husband's death.<sup>e</sup> And even where husband and wife made a lease for life or years of the wife's lands, if she agree to the lease after her husband's death, she shall have by survivorship the arrears of rent incurred during the coverture.<sup>f</sup> And the arrears of all rents, which became<sup>g</sup> due during the coverture, and of which the husband was seised in right of his wife, whether it be a rent service, charge or seek, shall survive to her.<sup>h</sup>

Wife takes  
by sur-  
vivorship  
her choses  
in action.

The wife shall also have, if she survive, the estates by statute merchant, statute staple, and elegit, of which her husband was seised during the coverture in her right.<sup>i</sup> And by the same right she takes all choses in action, such as bonds, mortgages, and all negotiable securities passed to her previous to, or during her marriage.<sup>j</sup>

Wife has  
by sur-  
vivorship all  
actions,  
which she  
and her  
husband  
might have  
had for in-  
juries to  
her prop-  
erty or per-  
son.<sup>k</sup>

And the surviving wife shall not only have these different kinds of property, as her own, but there will also survive to her all those actions, which husband and wife might have had for injuries done to the property or the person of the wife during the coverture. As if trees be cut on the land of the wife during the coverture, she may maintain trespass for the injury after her husband's death.<sup>l</sup> So if a battery or other personal tort be committed against a married woman, she may maintain an action for the injury, after her husband's death.<sup>m</sup>

Of para-  
phernalia.

Such are the interests of the wife in her own chattels, real and personal, and in those rights of action arising from injuries to her property and her person, which survive to her after the death of her husband. It is now to be inquired, what interest she derives from her husband's per-

e 1 Rol. Ab. 350.

f 2 Com. Dig. 84. 1 Rol. Ab. 350.

g Co. Lit. 351 a.

h Ibid.

i Ibid. 351 b.

j 1 D'Anv. Ab. 715. 1 Roll. Ab. 349. Sed vide Littleton's Rep. 285

k 1 D'Anv. Ab. 715. Littleton's Rep. 285.

sonal property by surviving him. And first, of that part of his property which is called the wife's paraphernalia. Cowel, in his Interpreter, and Blount, in his Dictionary, define the paraphernalia to be "those goods, which a wife, besides her dower and jointure, is, after her husband's death, allowed to have, as the furniture of her chamber, wearing apparel, and jewels, if she be of quality." And Noy, in his Maxims, says, "The woman shall have *all* her apparel, her bed, her coffer, her chains, borders and jewels, by the honourable custom of the realm, except her husband unkindly give them away.<sup>1</sup> Although Noy says she is entitled to all her apparel, it would appear that, if it be excessive, that is, more than is necessary for her, the husband's executors will be entitled to the excess.<sup>m</sup> And not only shall the clothes of the wife be paraphernalia, but whatever articles were given to her by her husband for the purpose of being made into clothes, shall be hers, although her husband shall have died before they were made.<sup>n</sup> The ornaments also of the wife's person given to her by her husband for that purpose, such as diamonds, pearls, &c. &c. form a part of her apparel, and the quantity to be allowed to her after her husband's death seems to depend on his quality and circumstances, of which the judges are to determine according to their discretion.<sup>o</sup> Lord Keeper Finch said, in *Lady Tyrrel's* case,<sup>p</sup> he never knew any paraphernalia allowed, but where the party was noble either by birth or marriage : however, none of the other cases on this subject make any such distinction.

Wife entitled to her paraphernalia after her husband's death.

Quantity of paraphernalia to be allowed to widow, depends on the quality and circumstances of her husband.

Gifts of jewels and other ornaments to a married woman, by a stranger, will not make them paraphernalia, as when they come from a stranger they become the wife's to her separate use, with all the characteristics belonging to such property. To constitute that kind of property called paraphernalia, they must have been the husband's, and given

Paraphernalia must have been

<sup>1</sup> Noy's Maxims, 108. chap. 49.  
<sup>m</sup> 1 Rol. Ab. 411.  
<sup>n</sup> 1 Rol. Ab. 911. 2 Com. Dig. 86.

<sup>o</sup> Hastings v. Douglas, Sir W. Jones, 332. Cro. Car. 343.  
<sup>p</sup> 2 Freem. 304.

given by  
the hus-  
band to  
his wife  
to be worn  
by her.

by him to his wife to be worn by her, or at least they must have been appropriated to her use.<sup>q</sup> But it does not appear to be necessary, for the purpose of completing the wife's right, that she should have had the continued possession of her jewels during her husband's life; for though they had been principally in his custody, yet if they had been worn by her, with the husband's permission, when dressed, it would be sufficient.<sup>r</sup> Nor is it necessary for the purpose of rendering jewels paraphernalia, that they should be worn by the wife always when she is dressed,<sup>s</sup> her using them on birth days, and other public occasions, will be sufficient to establish her claim.<sup>t</sup> But they ought to be proved to have been worn by her, otherwise they do not necessarily form part of her paraphernalia.<sup>u</sup>

Husband  
may dis-  
pose of  
wife's  
parapher-  
nalia dur-  
ing his life.

As these ornaments are intended for the use of the wife, they are usually given to her and left in her custody, yet she has not the power of alienating them during her husband's life,<sup>v</sup> as such an act would be inconsistent with the object in depositing them with her, but the husband may dispose of them in any way he thinks fit.<sup>w</sup> But to destroy her right by survivorship, the disposition by the husband must be a complete sale; for if he only pledge his wife's jewels for his debt, that will not be such an alienation of them as will bar her right to them as her paraphernalia. And Lord Hardwicke decided, that if a husband pledge his wife's paraphernalia, and die, leaving a sufficient estate to redeem the pledge, and to pay all his debts, she shall be entitled to have it redeemed out of the husband's personal estate.<sup>x</sup> However, his power over them is limited to acts which operate during his life, for he cannot dispose of them by will.<sup>y</sup> Indeed, it does not seem to have been quite clearly settled so lately even as the 9th year of Charles I.;

Pledging  
them not a  
disposition  
of them, if  
he leave  
sufficient  
to redeem  
them, and  
to pay his  
debts.

Cannot  
dispose of  
them by  
will.

<sup>q</sup> Graham v. Lord Londonderry, 3 Atk. 393.

<sup>r</sup> Northey v. Northey, 2 Atk. 77.

<sup>s</sup> Graham v. Londonderry, 3 Atk. 393.

<sup>t</sup> Seymore v. Tresilian, 3. Atk. 358.

<sup>u</sup> 3 Atk. 394.

<sup>v</sup> Noy's Maxims, 108. 2 Black. Com. 436. 3 Atk. 394.

<sup>w</sup> Graham v. Londonderry, 3 Atk. 393.

<sup>x</sup> 2 Black. Com. 436. 2 Atk. 77.

<sup>y</sup> 1 P. Wms. 729.

that the husband could not deprive his wife of her paraphernalia by his last will, as the Court was equally divided on this question in the case of *Hastings v. Douglas*.<sup>y</sup> Two of the Judges, Jones and Berkely, were of opinion that the wife ought to have her apparel and jewels suitable to her husband's circumstances, against his disposition by will; while the other two, Richardson and Croke, thought the husband had a right to bequeath every thing from his wife, with the exception of clothes necessary to cover her nakedness and protect her against the cold. However, the law seems to be now settled, that the wife cannot be deprived of her paraphernalia by the last will of her husband.<sup>z</sup> And though the husband should bequeath all his household goods, furniture, plate, jewels, linen, &c. &c., to the wife herself, for her life or widowhood, this will not have the effect of barring her of her paraphernalia<sup>a</sup>; and when he devises them to her for life for her use, and at the same time empowers her to raise, by mortgage of a particular estate, a sufficient sum for payment of his debts in aid of his personal estate, she will have her paraphernalia absolutely, notwithstanding.<sup>b</sup> It would seem, however, that where the husband devises them to the wife for her life, and she takes under the will, and does not claim them by her elder title, as paraphernalia, her personal representatives cannot have them. As in the case of *Sir Thomas Clarges v. Duchess of Albemarle*<sup>c</sup>, where the Duke had devised jewels of great value to his wife for her life, and she had died without having claimed them as paraphernalia, or elected to take them as such, the Court held, that her administrator could not set on foot such pretence after her death, to which she had made no claim in her lifetime.

As the husband cannot bequeath his wife's paraphernalia it follows, as of course, that they are not liable to legacies<sup>d</sup>;

Paraphernalia subject to hus-

<sup>y</sup> Sir W. Jones, 332. Cro. Car. 343.

<sup>z</sup> 2 Black. Com. 436. 2 Atk. 77.

<sup>3</sup> Atk. 358. 1 P. Wms. 729.

<sup>a</sup> Marshall v. Blew, 2 Atk. 217.

<sup>b</sup> Boynton v. Parkhurst. 1 Br. C. C. 576. 1 Cox. Rep. 106.

<sup>c</sup> 2 Vern. 246.

<sup>d</sup> Tipping v. Tipping, 1 P. Wms. 729. Snelson v. Corbet, 3 Atk. 369.

band's  
debts after  
his death

Where  
parapher-  
nalia ex-  
hausted in  
payment of  
debts, wife  
allowed in  
equity to  
indemnify  
herself out  
of hus-  
band's real  
assets.

for if they were, he could easily defeat the law, which forbids his bequeathing them, by giving legacies to the full extent of his personal assets. The paraphernalia are however subject to his debts after his decease.<sup>e</sup> But this rule must be confined to the ornaments of the wife, such as jewels, &c. &c., for her necessary apparel is not liable to creditors.<sup>f</sup> This liability of the paraphernalia to the husband's debts, exists both at law and in equity; but the latter jurisdiction, consistently with the regard it always manifests for the interests of the wife, so far favours this claim as to permit her to indemnify herself out of the real assets of the husband, if his specialty creditors exhaust his personal estate in the satisfaction of their demands. All the rules of the Court of Chancery relating to the marshalling of assets, are enforced in support of this equity. So that where the paraphernalia have been applied in payment of the specialty debts, the widow has a right, as well as the simple contract creditors, and preferably to the legatees, to stand in the place of these creditors as against the real estate, and to repay herself out of it.<sup>g</sup>

The wife's  
equity as to  
parapher-  
nalia not  
enforced  
against  
devisee.

But the wife shall not be satisfied for this claim out of the real estate at all events;<sup>h</sup> for, if the debts exhaust the husband's personal fortune, and the creditors are only by simple contract, and no trust is created of the real estate for the payment of debts,<sup>i</sup> she can have no relief, as there is no person having two funds to resort to for the satisfaction of his demands, and consequently no person in whose place she can stand, as against the real estate. So if the real estate be devised, and the debts exhaust the personal estate, the widow cannot have satisfaction decreed to her against the devisee; this equity is to be enforced only against the heir on whom the estate has descended, and he cannot have the paraphernalia applied in exoneration of

<sup>e</sup> Noy's Max. 188    2 Black. Com. 438.    2 Freem. 304.    Prec. Chan. 297.

<sup>f</sup> Ibid.

<sup>g</sup> Tipping v. Tipping, 1 P. Wms. 729.    Snelson v. Corbet, 3 Atk. 369.

<sup>h</sup> Ridout v. Lord Plymouth, 2 Atk.

104.

<sup>i</sup> Incledon v. Northcote, 3 Atk. 438.

the real assets.<sup>k</sup> But when it is said that devised estates are not assets liable to be marshalled in favour of this claim, it must be understood to mean where the estate has been devised beneficially, and not where it has been expressly devised for the payment of debts; for where it has been devised merely for this purpose, with the usual resulting trust for the heir at law, there the widow shall be reimbursed out of the real estate, if the specialty creditors have exhausted the personal estate<sup>l</sup>; but where the estate has been devised to a person not the heir at law, subject to the payment of debts, and the paraphernalia have been sold by the executors for payment of creditors, the personalty proving deficient for this purpose, it has been decided that the widow could not by circuitry be permitted to receive satisfaction out of the real assets.<sup>m</sup> In the case now referred to, the Lord Chancellor said, as the Court had not in any former instance decreed the wife satisfaction, by way of circuitry, out of real assets against the devisee for her paraphernalia, he would not establish a precedent. However, the case of *Tynt v. Tynt*,<sup>n</sup> seems to have been a precedent for this point, as the Master of the Rolls held in it that the paraphernalia of the widow are liable only in favour of creditors, and not of the heir, *nor of the devisee* who stands in place of the heir, and is *hæres factus*, and that if the lands devised were sufficient to pay the incumbrances, the paraphernalia shall be enjoyed by the widow: thus putting the heir and devisee on the same footing as to the paraphernalia, when the personalty is insufficient for the payment of the specialty debts.

The wife's equity to her paraphernalia enforced against devisee for payment of debts.

But if the real and personal assets of the husband are insufficient for the payment of his debt at the time of his decease, or, at least, at the time of the application of the paraphernalia in discharge of the debts, the widow shall

If paraphernalia applied in discharge of husband's debts, his

<sup>k</sup> *Probert v. Morgan*, 1 Atk. 440.  
<sup>l</sup> *Snelson v. Corbet*, 3 Atk. 369. *Tipping v. Tipping*, 1 P. Wms. 729.

<sup>1</sup> *Inclendon v. Northcote* 3 Atk. 438.

<sup>m</sup> *Probert v. Clifford* Amb. 6.  
<sup>n</sup> 2. P. Wms. 542.

real and personal assets being exhausted, widow not to be reimbursed of assets subsequently fallen in.

not be reimbursed out of assets, which happen to fall in subsequently. This rule was laid down by Lord Macclesfield in the case of *Burton v. Pierpoint*,<sup>o</sup> where Mr. Pierpoint being seised of a reversion in fee expectant, on the failure of his issue male, and being also seised in fee simple of another estate, devised to his wife her jewels and the use of his plate to her for her life, and all his real estates he devised subject to his debts and legacies, to his kinsman, Lord Dorchester. At the time of his death he left only two sons minors, and the real and personal assets of the testator being insufficient for the payment of his debts, the paraphernalia were necessarily applied to that use. The sons afterwards dying under age, the testator's reversion in fee became assets liable to his debts under his will. And on the application of the widow, to be paid the amount of her jewels out of the accession of assets, the Chancellor held, that she had no claim to the amount of her jewels as paraphernalia, because when these jewels were applied to the payment of debts, there was a deficiency of assets; and though afterwards, upon a remote contingency, such as was not to be presumed or waited for, viz. a death without issue, assets had fallen in, yet that this should not alter the case as to *bona paraphernalia*. However, although his Lordship refused the amount of the jewels out of these assets to the widow as paraphernalia, yet he allowed it to her in the character of legatee, saying, that "as there was an express bequest of the jewels to the widow, although at the time of the death of the testator there were no assets, yet since afterwards assets had happened, there could be now no inconvenience to any creditor or others." It is questionable whether this distinction between the right of a legatee, and that of a widow claiming her paraphernalia out of assets falling in after the personal estate had been exhausted, would be now considered valid. For his Lordship gave as a reason for this latter decision, that it was a constant rule that a legatee, where the real estate is made



liable to pay debts, on the creditor's exhausting the personal assets, shall stand in the place of the creditors, and be paid out of the land. But it is as constant a rule that, in such a case, the widow whose paraphernalia have been applied in payment of the debts, shall stand in the place of the creditors, and be paid out of the land, and that too in preference to legatees, and this rule would be as good, if not a better reason, for giving the widow the amount of her jewels as paraphernalia, and not as a legacy, out of the newly acquired assets, the former being an elder and higher title than the latter.

As the husband cannot deprive his widow of her interest in her paraphernalia by his will, it is quite immaterial to her, so far as this claim is concerned, whether he dies intestate or not; but as the remaining part of his personal property is absolutely at his disposal, by any form of instrument, operating either during his life or after his death, it becomes important to inquire what interest she takes in it by surviving him, when he has died without exercising such power. And this interest is now regulated and ascertained by an act passed in the 22 & 23 Car. 2. c. 10., called the statute of distributions. By this statute it is provided, that the surplusage of the goods, chattels, and credits of persons dying intestate, (all debts, funeral charges, and just expenses of every sort, being first allowed and deducted,) shall be distributed in the manner following, that is, one third part to the wife of the intestate, and all the residue by equal portions to and amongst the children of such persons dying intestate, and their legal representatives, &c. &c. And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the said intestate, the residue of the said estate to be distributed equally to every of the next of kindred of the intestate, who are in equal degree, and those who equally represent them.

Wife's interest in husband's personal property, when he dies intestate.

Statute of distributions.

However, this statute of distributions does not affect the customs of the city of London, or the province of York, or of any other place having a peculiar custom of distri-

Wife's interest in husband's personalty

by customs  
of London  
and York.

buting intestate's effects, as they are expressly excepted by it. The custom of London and of York with respect to the distribution of an intestate's effects is, if the deceased leaves a widow and children, she has, in the first place, the widow's apparel, and the furniture of her chamber (which in London is called the widow's chamber); the remainder of his personalty is then divided into three parts, one of which belongs to the widow, another to the children, and the third to the administrator; if only a widow, or only children, they shall respectively, in either case, take one moiety, and the administrator the other; if neither widow nor child, the administrator shall have the whole.<sup>p</sup> And so far the widow had precisely the same share (with the exception of the widow's chamber) under the statute of distributions, and according to these customs; but the 1 Jac. 2. c. 17. greatly increased her share, as it declared that the share, hitherto allotted by the custom to the administrator, and called the dead man's share, should in future be divided according to the statute of distributions. And thus the widow has, in the event of an intestacy by her husband, where these customs exist, if there be no child, one half according to the custom, and the half of the dead man's share, according to this statute of James; if there be children, then she takes one third of the entire, according to the custom, and one third of the dead man's share. So that if a man die intestate, where these customs do not prevail, leaving no children, and his personalty, amounting to 1800*l.*, his widow will have only 900*l.* according to the statute of distributions; and if he leave children, then her share will be only 600*l.*; whereas, if the intestacy occur, where these customs do prevail, she takes, where there are no children, 1350*l.*; and where there are children, her share amounts to 800*l.*

Formerly the husband could not dispose by will of the widow's or the children's shares, to which they were entitled according to the custom; but by the 11 Geo. 1. c. 18. freemen are now at liberty to bequeath their personal estates, as where the custom does not prevail.

## CHAP. VII.

OF THE ACTS BY WHICH THE WIFE'S RIGHT BY SURVIVORSHIP TO  
HER CHATTELS REAL MAY BE BARRED.

It has been seen in a preceding chapter, that the husband acquires, by the mere operation of the marriage, without the aid of any settlement, a property in his wife's chattels real, and in her choses in action, of which he has power to dispose at any time during his life ; and that if he die in the lifetime of his wife, without having reduced them into possession, they will survive to her.<sup>a</sup> And the reason of the rule is this, that the husband has not an absolute and unconditional property in these interests, but only a right to make them his own by adopting proceedings for this purpose suited to their respective natures, and therefore if he should die without having exercised his dominion in this way, they continue undisturbed in the same plight in which he found them, and remain the property of the wife.<sup>b</sup> It is to be observed, that whatever interests survive to the wife at law, the same kind of interests will survive to her in equity also. Her chattels real and her choses in action survive to her at law, and if they happen to be vested in a trustee for her, or to be of an equitable quality, they survive to her in equity, unless the husband has in his lifetime done some act to destroy this title.<sup>c</sup> It therefore becomes important, with a view to the event of the wife surviving her husband, to inquire what acts or proceedings with respect to this description of her property will render his title to it complete and absolute, and will destroy her contingent right by survivorship.

Husband  
has only a  
qualified  
interest in  
wife's  
chattels  
real.

Chattels  
real and  
choses in  
action of  
wife sur-  
vive to her  
at law and  
in equity.

<sup>a</sup> Co. Lit 46. b. 351 a, b.

<sup>b</sup> Burnet v. Kinaston, 2 Vern. 401.  
Prec. Chan. 118. Ld. Carteret v. Pas-

chal. 3 P. Wms, 197. Langham v.  
Nenny, 3 Ves. 467.  
<sup>c</sup> 9 Ves. 98.

Wife's survivorship may be barred by settlement, 1st, before marriage; 2dly, after marriage, in pursuance of settlement before it, if it be adequate.

And, in the first place, this right of the wife may be barred by a settlement made upon her before marriage, or by a settlement after marriage, in pursuance of an agreement before marriage. If the husband have purchased his wife's fortune, including her terms for years and choses in action by a settlement upon her, her chance of it by survivorship is destroyed. But as it depends on the intention of the parties whether the settlement by the husband shall be deemed the purchase of the wife's fortune or of any part of it, it will be necessary to ascertain the requisites in an instrument of that nature for effecting such a purpose, and to point out the language which has been held to indicate such an intent. And a settlement *adequate* to the wife's fortune has been considered as amounting to a purchase of the entire of it, though there were no agreement between the parties to that effect,<sup>d</sup> and consequently will bar her right by survivorship to such part of it as consists of terms for years or choses in action.

Wife's survivorship barred by settlement expressed to be in consideration of her entire fortune.

So it seems that a settlement on marriage *expressed* to be in consideration of the portion, to which the wife was *then* entitled, or should afterwards become entitled, would be considered the purchase of the entire of her fortune, whether legal or equitable, and would bar her contingent right of survivorship in it, although it had not been reduced into possession by the husband in his lifetime.<sup>e</sup> But if the settlement be expressed to be in consideration of part only of the wife's fortune, her right of survivorship will be affected as to that part only, and the remainder will survive to her, if it consist of chattels real, or of choses in action.<sup>f</sup> Or if the settlement be expressed to be in consideration of a specified sum of money, being the amount of the wife's fortune at the time, or of the fortune (without specifying any amount) to which she was entitled at the time of the marriage,<sup>g</sup> the husband will be the purchaser of so much only, and the wife will be barred of her right of survivor-

<sup>d</sup> Blois v. Lady Hertford, 2 Vern. 501. Cleland, v. Cleland, Prec. Chan. 63.

<sup>e</sup> Garforth v. Bradley, 2 Ves.

<sup>sen.</sup> 677. Mitford v. Mitford, 9 Ves. 96.

<sup>f</sup> Cleland v. Cleland, Pr. Ch. 63.

<sup>g</sup> Carr v. Taylor, 10 Ves. 574.

ship only to such chattels real, and choses in action, as were hers at the time of the marriage ; and if any accession of such property should come to her after the marriage, it will not be affected by the settlement.

But although an actual settlement by the husband on his wife will be deemed to be the purchase of so much of her portion as may be implied from the extent and adequacy of such settlement, or of so much of it as it is expressed to be the purchase of, and will bar her right by survivorship to that kind of property which is capable of surviving, so far as that consideration extends, yet mere articles on marriage by the husband, or by any person on his behalf, to make a settlement, will not bar this right, if the husband should die without having performed the agreement ; on the contrary, if the engagement be not fulfilled during the life of the husband, and if the money have not been paid to him, it will survive to her.<sup>b</sup> And the principle of the decisions is this, that so long as the obligations of the husband remain unperformed, neither he, nor any person claiming under him, ought to be permitted to receive any portion of his wife's fortune.

Articles unperformed by the husband, will not bar the wife's right by survivorship.

These are the contracts before marriage, which may affect the wife's right by survivorship to property, to which she is then entitled, or to which she may become entitled at any time during the coverture. But if the settlement be during the marriage, and not in pursuance of an agreement before marriage, then it would seem that the wife cannot enter into any contract, which would bar her right by survivorship to any part of her fortune. In *Stamper v. Barker and Others*<sup>i</sup>, Sir John Leach decided that a deed, executed by a married woman, who was an infant, her father as her trustee, and her husband, by which she agreed that her husband should have a certain part of her contingent property, if it should so fall into possession, did not bar her right by survivorship, because, being a *feme covert*, she was incapable of contracting.

<sup>b</sup> *Howman v. Corie*, 2 Vern. 190. *Pyke v. Pyke*, 1 Ves. sen. 376. *Mitford v. Mitford*, 9 Ves. 87.

<sup>i</sup> 5 Mad. 157.

How wife may be barred of survivorship in chattels real.

By assignment with or without consideration.

Barred by lease.

Wife's right of survivorship in term for years.

But although the *wife* cannot destroy her right of survivorship during the marriage by any act of her own, there are many acts, varying as to the quality of the property, by which the husband may accomplish this purpose. . And, first, of her chattels real, which, it has been shown, survive to the wife, unless the husband have done some act to destroy this claim. He may bar this right in her chattels real by assignment, with or without consideration,<sup>j</sup> and he may so assign them, whether they are legal or equitable interests.<sup>k</sup> As to the wife's legal chattels real, of which the legal title is in her, they are distinguished by this peculiarity, that they do not admit or stand in need of being reduced into possession ; they are already in possession<sup>l</sup>. and do not, like choses in action, require any proceeding to give the husband the right to the rents and profits of them. The wife's equitable interest in chattels real do admit of being reduced into possession, and require it for the purpose of giving the husband the legal title to them, and, therefore, her claim to them by survivorship may be defeated by his possession so obtained.

So the husband may bar his wife's right of survivorship to her legal interest in terms for years by lease, even when the lease is not to commence till the death of the husband. As where baron and feme joint-tenants for sixty years, the baron by indenture leased all the land for seventy years, to commence immediately after his death. The baron dieth, and the wife surviveth. The question was, if this be a good lease to charge the possession of the feme ? And it was adjudged a good lease, because although not to commence in possession till the death of the baron, yet it commenced in interest immediately.<sup>m</sup>

The husband may also dispose of part of his wife's term for years by lease, and it will bar her right of survivorship to so much as has been so demised ; but a disposition of a

<sup>j</sup> Mitford v. Mitford, 9 Ves. 98. 3 P.Wms. 197.

<sup>k</sup> Ibid.

<sup>l</sup> Mitford v. Mitford, 9 Ves. 98. 3 P. Wms. 197.

<sup>m</sup> Poph. 4. Grute v. Locroft, Cro. Eliz. 287.

part will not bar the wife surviving of the whole ; as if a man be possessed of a term for forty years in right of his wife, and make the lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term, but the executors of the husband shall have the rent, for it was not incident to the reversion, for that the wife was not party to the lease.<sup>n</sup>

barred by  
lease of  
part of it.

And the husband may bar his wife's right by survivorship in her term for years by a conditional grant of it, though the condition should afterwards be broken. As if he grant the whole term, upon condition that the grantee shall pay a sum of money to his executors, the husband dies, the condition is broken, the executors enter ; this is a disposition of the term, and the wife is barred thereof, for the whole interest has passed away.<sup>o</sup> But if husband and wife, possessed of a term in her right, grant it on condition, and re-enter it for the condition broken, that shall not bar the wife of her right by survivorship.<sup>p</sup>

Wife barred by  
grant on  
condition  
by husband.

The husband may also bar his wife of her right by survivorship in a term of years by a mere covenant to lease it for the entire of his interest in it. As in *Steed v. Cragh*,<sup>q</sup> where the husband, being possessed of a long term of years in right of his wife, made an under lease for ten years, and afterwards having borrowed a sum of money from the lessee, he covenanted that he would grant another lease of the premises, to commence from the expiration of the ten years' lease, and to continue during the time he had any right, but died before he made such lease. The Master of the Rolls decreed, that this covenant was a good disposition of the said term in equity, because the husband had a power to dispose of it, and that the covenant was such a lien as bound the right in whose hands soever it went.

Wife barred by  
covenant  
of husband  
to make a  
lease for  
the entire  
term.

In like manner, where the husband and wife, possessed of a term for years in her right, were ejected from it, and the husband brought an ejectment in his own name alone,

Wife barred by  
ejectment  
in name of  
husband  
alone.

<sup>n</sup> Co. Lit. 46 b. Sym's case, Cro. Eliz. 33. 1 Rol. Ab. 344.  
<sup>o</sup> Co. Lit. 46 b.

p 1 Rol. Ab. 344.  
q 9 Mod. 43. 2 Eq. Ab. 37.

Wife barred of her survivorship by an award of part of her term to her husband.

Wife barred of survivorship by surrender of husband.

By husband's acceptance of feoffment from lessor.

By sale of them by sheriff for husband's debt.

Wife barred of survivorship by the outlawry, attainder, or suicide of her husband.

and had judgment, it was held that this was such an alteration of the property in the term as to vest it in the husband. And if a dispute arise between the husband and a stranger relating to the title of a term claimed in right of the wife, and it be referred, and the arbitrator award part of the term to husband and part to the stranger, this award shall bind the wife's surviving.<sup>a</sup>

The husband may also bar his wife's right of survivorship in her term by surrendering it, and a surrender in law will be as effectual for this purpose as a surrender in deed. And it has been held that the acceptance of a feoffment by baron, from the lessor of a lease to baron and feme, is a surrender by the baron, and defeats the feme's right by survivorship. This decision was in the case of *Downing v. Seymour*,<sup>1</sup> where a lease had been made to husband and wife for years, and the lessor afterwards enfeoffed the husband, who died seised. The wife survived and claimed the term; and the question between her and the heir of the husband was, whether this term was extinguished. And it was held by the whole court, that by the acceptance of the feoffment the husband had surrendered the term, and it is extinguished. But if the conveyance had been by bargain and sale inrolled, or by fine, it had been otherwise.

The wife's right by survivorship in her terms for years may be barred by the sale of them under an execution by the sheriff for the debt of the husband.<sup>2</sup> But if it be extended for his debt and after the baron dies, the feme shall have the residue.<sup>3</sup> Or if there be judgment against the husband, or if he acknowledge a statute and die before any execution issued, the wife will have her term for years by survivorship.<sup>4</sup>

As the wife's term may be sold for the debts of her husband, so they may be forfeited by him by his crimes; for if he be outlawed or attainted, it will be forfeited, and she

<sup>a</sup> r Co. Lit. 46 b.  
<sup>s</sup> 1 Rol. Ab. 245.  
<sup>t</sup> Cro. Eliz. 911.  
<sup>u</sup> Co. Lit. 351 a.

<sup>v</sup> 4 Vin. Ab. 49. tit. Bar. and Feme.  
<sup>w</sup> 1 Rol. Ab. 346.



will be defeated of her right by survivorship.<sup>x</sup> And if he be guilty of suicide, her term will be forfeited.<sup>y</sup>

But though the wife's right of survivorship to her term for years may be defeated by these several modes, still, if the husband grant a rent charge out of it and die, she shall have the term discharged of this rent, for her title is paramount to this charge.<sup>z</sup>

The husband has the same power of disposing of his wife's other chattels real, such as her estates, by statute merchant, statute staple, and elegit<sup>a</sup>, with or without consideration.<sup>b</sup> And where a widow filed a bill for the arrears of her jointure, and had a decree, that the possession of certain lands mentioned in the decree, part of the real estate of her late husband, should be forthwith delivered to her, and that the tenants thereof should pay their rents to her, and that she should enjoy the same until she should be reimbursed all arrears of her jointure with costs, and the widow married afterwards, it was held by Lord Chancellor King that her husband might assign the benefit of this decree without a valuable consideration, looking upon it as a term for years, and assignable by the husband, with or without a consideration, like any other term of the wife.<sup>c</sup>

The husband has the same power over the terms for years of the wife, which she was possessed of as executrix. As where a husband possessed of a lease of tithes in right of his wife, as executrix to her former husband, grants all his right, title, and interest in the tithes aforesaid, the Court unanimously resolved that the grant was good, and the lease he had in right of his wife did thereby pass.<sup>d</sup> In like manner it has been decided, that the husband possessed of a term for years, in right of his wife, as administratrix of her former husband, may surrender it. In *Levick v. Coppin*,<sup>e</sup>

By grant.  
By surrender.

<sup>x</sup> Co. Lit. 351 a.  
<sup>y</sup> Jenkin's Cent. 65. 1 Hawk.  
P. C. 103.  
<sup>z</sup> 1 Rol. Ab. 346. Co. Lit. 184 b.  
351 a.  
<sup>a</sup> Co. Lit. 351.

<sup>b</sup> Lord Carteret v. Paschal, 3 P.  
Wms. 197.  
<sup>c</sup> Ibid.  
<sup>d</sup> Arnold v. Bidgood, Cro. Jac.  
318. Jenk Cent. 79.  
<sup>e</sup> 3 Wils. 277. 2 Sir W. Black.  
Rep. 801.

a verdict was found for the plaintiff, subject to the opinion of the Court on this question ; whether the wife being possessed of the premises as administratrix, her marriage with the defendant vested in him a right sufficient to enable him to surrender this lease ? And the judges having taken time to consider, decided, that he had such right on this ground, that the husband may administer in the right of his wife without her consent, though she cannot administer without the consent of her husband ; and that if the husband can administer, *jure uxoris*, without her consent, it is incident to the power of administration to sell or dispose of a term of years. It is not, however, to be understood that the marriage gives the husband a beneficial interest in such property of his wife ; on the contrary, he will be liable for any destruction or misapplication of it, either by her, with his concurrence, or by himself.<sup>f</sup> The above cases establish only that he has the legal estate in such property, and can convey a legal title in it to others. But if he does not reduce it into possession, the wife dying in the lifetime of her husband, may transmit it by will even without his consent ; however, nothing will pass by it but by a prior right of representation to the former owner, to whom she was personal representative.<sup>g</sup> If she has any beneficial interest under the will of her testator, or as the administratrix of an intestate, her will in her husband's lifetime cannot transmit these, it will pass her legal rights only ;<sup>h</sup> that is, it can give to another her own power of administering the assets, but it cannot convey any beneficial interest she may have in them either as legatee or next of kin ; of these she must die intestate, being a married woman.

<sup>f</sup> See Book I. Ch. 2.

<sup>h</sup> Stevens v. Bagwell, 15 Ves.

<sup>g</sup> Hodsdon v. Loyd, 2 Br. C. C. 156.

49. Eden. 543. Scammell v. Wilkinson, 2 East, 556.

## CHAP. VIII.

OF THE ACTS BY WHICH THE WIFE'S RIGHT BY SURVIVORSHIP TO HER LEGAL AND EQUITABLE CHOSSES IN ACTION, IMMEDIATELY REDUCIBLE INTO POSSESSION, MAY BE BARRED.

IN the last chapter the acts by which the wife may be barred of her right by survivorship to her chattels real have been enumerated : the acts by which she may be deprived of the same right to her choses in action are now to be considered. Choses in action are chattels personal, such as debts by obligation, contract, or otherwise,<sup>a</sup> for rent, money lent, money had and received, or for the price of work and labour, &c &c., also legacies, shares of intestates' estates, money in the funds, or any other claim to personal property, which has not been reduced into possession. All these duties give a right of action to recover them, but do not transfer the actual occupation of them ; they are recoverable only, and so long as they remain in this state they are said to be in action ; but when the right of action has been exercised, and they have been recovered, they are then considered to be in possession. Choses in action are legal and equitable, the former being rights which can be asserted only by action in a court of law, the latter being recoverable only by suit in equity, being vested in trustees who have the legal property in them, or being in some other way under the control of that jurisdiction.

Choses in action legal and equitable.

The husband takes only a qualified interest in these personal chattels of his wife, as well as in her real chattels ; for if he do not reduce them into possession in his lifetime, they survive to her. There are, however, some pe-

Choses in action of wife, not reduced into possession in hus-

<sup>a</sup> Co. Lit. 351 b.

band's life-  
time, sur-  
vive to her.

cularities attending them, which distinguished them from chattels real. They are not assignable at law, because it is contrary to the principles of the common law, as being an encouragement to litigiousness, that one man should transfer to another his right of bringing an action.<sup>b</sup> This rule has two exceptions, for choses in action of every description are assignable by and to the King, and bills of exchange and promissory notes are assignable to and by any person.<sup>c</sup> But these rights of action are assignable in equity, and such a transfer will be protected there.<sup>d</sup> Chattels real may be assigned both at law and in equity. So choses in action, though assignable in equity, yet, if they have been the property of a married woman, they cannot be assigned or otherwise disposed of by the husband so as to bar her claim by survivorship, unless a valuable consideration have been given for them;<sup>e</sup> but her chattels real may be assigned by him at law or in equity, with or without consideration, and such a disposition of them will bar the wife's title as survivor.<sup>f</sup>

Wife's  
right by  
survivor-  
ship may  
be barred  
by settle-  
ment.

This right by survivorship, which the wife has to her choses in action, that have not been reduced into possession during the husband's life, may be prevented in various ways; and, first, by a settlement made between husband and wife, either before marriage or after marriage, in pursuance of an agreement before it.<sup>g</sup>

Wife's sur-  
vivorship  
barred by  
a release.

The husband may bar his wife's right by survivorship to her choses in action by a release also; for as the release operates as an extinguishment of the demand, there is nothing remaining which can survive. "A man may discharge or release any thing due, or any wrong done to his wife, before or after marriage."<sup>h</sup> If any wrong be done, or obligation, statute, or promise, made to her alone, or to her and her husband together, at any time during the marriage, husband alone may discharge and release this.<sup>i</sup> He

<sup>b</sup> 2 Black. Com. 442.

<sup>c</sup> Ibid.

<sup>d</sup> Ibid. 3 P. Wms. 200.

<sup>e</sup> 9 Ves. 99. 2 Vern. 401.

<sup>f</sup> 9 Ves. 98.

<sup>g</sup> See Book 1. Ch. 7. p. 102, 103.

<sup>h</sup> Sheph. Touch. 333. 2 Rol. Ab. tit. Release.

<sup>i</sup> Ibid.

may release his wife's bond without receiving any part of the money ;<sup>j</sup> and if the wife be executrix to another, the husband may release any debt or duty due even to the testator.<sup>k</sup> So the husband may release a legacy bequeathed to his wife, though husband and wife had been divorced *a mensa et thoro*.<sup>l</sup> And even where the wife had recovered costs in the Ecclesiastical Court against another woman for adultery with her husband, it has been held, that he may release them :<sup>m</sup> and he may release not only the debt or duty which is presently payable to his wife, but even that which is not payable till a future day. As, if he release a legacy before the day on which the testator directs it to be paid, the wife is barred.<sup>n</sup> He may release a legacy left to the wife, payable eighteen months after, though the months are not expired ; for he has an interest in it before the time of payment accrues.<sup>o</sup> So he may release any right or duty which by possibility may happen to accrue during the marriage ;<sup>p</sup> but the husband cannot release a right or duty which by no possibility can accrue to her during the marriage :<sup>q</sup> as where a promise was made by a man to a woman, that if she will marry A. B. he will pay her forty shillings per year during her life after the death of A. B., and the woman accordingly married A. B., it was held, that A. B., the husband, could not release this demand, so as to bar the wife surviving, because it was not in demand during his life, nor could by any possibility be demanded by him.<sup>r</sup>

If the husband reduces his wife's choses in action into his actual possession, it will of course operate as an effectual bar to her right by survivorship, because they have ceased to be choses in action, and have become choses in possession ; and the husband has thereby performed the condition by which they are rendered his absolute property.

Wife's survivorship barred by a reduction into possession.

j 2 Atk. 208.  
k Sheph. Touch. 333. 2 Rol. Ab.  
tit. Release.  
l 1 Salk. 115.  
m Ibid. 1 Ld. Raym. 73.  
n Sheph. Touch. 333.

o 2 Rol. Rep. 134. 4 Vin. 44.  
p 1 Salk. 326.  
q Ibid.  
r Belcher and Wife v. Hudson,  
Cro. Jac. 222.

Wife's survivorship barred by receipt of her choses in action, by a third person, by husband's authority.

However, there are various acts which, although they fall short of an actual reduction into the possession of the husband, are yet considered to be so far tantamount to it as to create an equal bar to this right of the wife; as, if the husband alone, or the husband and wife, authorise a third person to receive her choses in action, who accordingly does receive them, her right by survivorship is completely destroyed by such receipt, although they should never reach the possession of the husband.<sup>s</sup> Where, on a bond executed to the wife, the husband gave a letter of attorney to another to receive the money, who received it, the wife dies, and then the husband dies; it was held, that the action was properly brought by the executor of the husband.<sup>t</sup> So, where a legacy was left to a *feme sole*, who afterwards marries, husband and wife give a letter of attorney to another to receive the legacy, and he receives it, the wife then dies, and afterwards the husband, and an action was brought by his administrator for the amount of the legacy against the person who had received it, and it was adjudged that the action was rightly brought, because the receipt of the legacy by the person having the letter of attorney altered the property in it, and vested it in the husband alone.<sup>u</sup> In like manner, if a woman make a lease for life, reserving a rent, and marry, and during the coverture a receiver be appointed, who receives the rent, and the husband dies without having been paid the rent by the receiver, the executor of the husband, and not the wife, shall have an action against the receiver, and therefore her right by survivorship is barred.<sup>v</sup>

Wife's survivorship to her choses in action due to her *dum sola*, barred by a judgment and execution at suit of husband and wife.

The wife's right by survivorship to her choses in action, may be barred also by a judgment recovered for them during the coverture. A distinction, however, must be observed between a judgment during coverture for the choses in action due to the wife *dum sola*, and a judgment for the choses in action accruing to her during *the marriage*. If the judgment be recovered for the wife's choses

<sup>s</sup> 1 Rol. Ab. 342.

<sup>t</sup> Huntly v. Griffith, Moor. 452.

<sup>u</sup> Huntly v. Griffith, Moor. 457.

<sup>v</sup> 1 Rol. Ab. 342.

<sup>v</sup> 1 Rol. Ab. 350.

in action, which had been due to her *dum sola*, it must be followed by an execution to operate as a bar to her right by survivorship ;<sup>w</sup> but if it be for chosses in action accruing to her during the marriage, then it *may* be a bar, although no execution have been issued upon it. Whether it be a bar or not will depend on the circumstance, whether the judgment has been recovered in the name of the husband alone, or in the joint names of husband and wife, for where he sues alone for her chosses accruing during marriage, and has judgment, it is held, that the benefit of the judgment does not survive to her,<sup>x</sup> but where they have sued jointly, it does survive. And the reason given for this distinction is, that the husband's bringing the action in his own name alone, is a disagreement to his wife's interest, and implies it to be his intention that it should not survive to her ; but if he bring the action in the joint names of himself and his wife, the judgment is that they both shall recover, so that the surviving wife, and not the representative of the husband, is to bring the *scire facias* on the judgment. His bringing the action therefore in the joint names of himself and his wife, does not in effect alter the property, or show it to be his intention that it should be altered.<sup>y</sup> This difference does not exist in equity, because, at whatever time the chosses in action have accrued, the wife must be a party to the suit, as she has an interest in it, to which her husband cannot disagree, viz. her equity.

Wife's survivorship to her chosses in action, accruing during coverture, barred by a judgment recovered by husband alone.

There is some confusion amongst the cases upon this subject, which requires to be cleared up. In *Oglander v. Baston*,<sup>z</sup> Lord Chancellor Jefferies said that a judgment for the debt due to the wife changed the property in it, and vested it in the husband. While, on the other hand, Chief Justice Hide certified in *Nanney v. Martin*,<sup>a</sup> that the benefit of a judgment for money in right of the wife, survived to her, which was confirmed by the Chancellor. So in *Packer v.*

w Bond v. Simmons, 3 Atk. 20.

x Aley, 36.

y See Mr. Butler's note (304), to Co. Lit. 351 a.

z 1 Vern. 396.

a 1 Chan. Cas. 27. 1 Eq. Ab.

*Windham*,<sup>b</sup> the Chancellor seemed to think that such a judgment would not have carried the debt to the husband's representatives against the wife surviving. But Lord Hardwicke says, in *Bond v. Simmons*, that "where the husband recovered a judgment for the debt of the wife, and had died before execution, the wife would have been entitled, and not the husband's executor," thus seeming to consider an execution on the judgment to be requisite for the purpose of barring the wife. And the same judge, afterwards, in *Garforth v. Bradley*,<sup>d</sup> says, that if the husband bring the action alone for the debt due to the wife, and having judgment, she will be barred by the judgment, and that if she be joined in the action, the benefit of the judgment will survive to her; thus putting the effect of the judgment on the circumstance of the wife having been, or not having been a party to the suit, and not, as his Lordship had expressed himself in *Bond v. Simmons*, on the circumstance of the judgment having been followed by an execution or not. However, it is apprehended, that the apparent contradiction of these cases may be reconciled in this way. When Lord Hardwicke says, in *Garforth v. Bradley*,<sup>e</sup> that the judgment would *not* survive to the wife, if the action be brought in the name of the husband alone, his Lordship expressly confines his observations to the choses in action accruing to the wife during the marriage, (which was the case before his Lordship,) for which the husband may or may not join his wife with him, if he sue for them. And his Lordship accordingly cites Alleyn,<sup>f</sup> where it was held, in the case of a bond to husband and wife *during coverture*, that the husband might maintain an action on the bond in his own name alone, and have judgment in his own name alone, and that this was a disagreeing to his wife's interest, and it should not survive to her, but go to his representatives. But when his Lordship says, in *Bond v. Simmons*,<sup>g</sup> that the benefit of the judgment would survive to the wife if the

b Prec. Chan. 415.

c 3 Atk. 20.

d 2 Ves. sen. 677.

e 2 Ves. sen. 677.

f Alleyn, 36.

g 3 Atk. 60.



husband had died before execution was issued, it is evidently said of a recovery of such choses in action similarly circumstanced as those which were the subject of the suit, namely, choses in action due to the wife *dum sola*, for which the husband must have joined his wife in the action with him.<sup>h</sup> And, therefore, the rule his Lordship seems to have laid down in *Bond v. Simmons*<sup>i</sup>, and *Gerrforth v. Bradley*,<sup>j</sup>) is this, that if the judgment be for the recovery of choses in action due to the wife *dum sola*, it shall survive to the wife, unless the husband have issued execution, because, as the action in this case *must* be brought in the names of husband and wife, no inference of the husband's intention with respect to her right by survivorship can be drawn from the mere circumstance of the action being joint, but the issuing of the execution is considered as evidence of the husband's intention of reducing the chose in action into possession, and of thus barring his wife's title by survivorship; but that if the judgment be for choses in action accruing *during the marriage*, then, as the husband was at liberty to have sued alone, or to have joined his wife with him in the action, as he pleased, if he had not made her a party, the judgment would bar her right surviving, though he should have died without having issued an execution. If this be the right rule, it will explain and reconcile the cases which have been cited above on this subject. For when Lord Jefferies says, in *Oglander v. Baston*<sup>k</sup>, that a judgment for a debt due to the wife changes the property and vests it in the husband, his Lordship clearly means a judgment obtained by the husband alone for a chose in action accruing to the wife during the marriage, because his Lordship subsequently observes, that "if there be a bond debt due to the wife, the husband may sue alone without joining his wife," which is not true in any case except where the debt accrues during the marriage. With respect to the dicta in *Packer v. Wind-*

Judgment for choses in action due to the wife *dum sola* survive to her, unless execution issue.

Judgment by husband alone for choses of the wife accruing during marriage, bars her right of survivorship.

<sup>h</sup> Bates v. Dandy, 2 Atk. 206.  
<sup>i</sup> 3 Atk. 20.

<sup>j</sup> 2 Ves. sen. 677.  
<sup>k</sup> 1 Vern. 396.

*ham*<sup>1</sup> and *Nanny v. Martin*<sup>m</sup>, for any thing appearing to the contrary, they may have been pronounced of judgments for choses in action of the wife accruing during marriage, in which the husband had recovered *alone*, and, therefore, may have been quite consistent with the opinion of Lord Hardwicke, in *Bond v. Simmons*.<sup>n</sup>

Wife's title by survivorship barred by a decree, directing payment, to which she and her husband were parties.

And not only a judgment, accompanied by the circumstances above stated, will bar the wife's right by survivorship, but a decree of a court of equity, to which husband and wife were parties, establishing her right, and directing payment, will vest the property absolutely in him, and bar her title. As in *Forbes v. Phipps*,<sup>o</sup> where a *feme covert* being entitled to a share of the residue of a testator's estate, upon a bill filed by another residuary legatee, to which she and her husband were parties defendants, a decree had been made directing a sale of the estate, and an account, and that the respective shares should be *paid* to them. Lord Northington held, that the share vested absolutely in the husband by the decree, and that the wife surviving was not entitled.

Wife's survivorship barred by an order of the court, for payment to the husband.

An order also in a suit in equity, that a sum of money shall be *paid* to the husband in right of his wife, bars her right by survivorship. As in *Heygate v. Annesley*<sup>p</sup>, where the husband having died after such an order, the wife applied for the money, and the executor of the husband submitted that he was entitled to it. Lord Thurlow held it was a vested interest in the husband, and ordered it to be paid to the executor.

In these cases it is observable, that not only the right to the wife's choses in action was established, but there was a direction for the payment of the money. But if the decree only establish the right without making any order for the payment, and the money be detained in court, or be ordered to be paid into court for the benefit of the wife

<sup>1</sup> Prec. Chan. 415.  
<sup>m</sup> 1 Chan. Cas 27. 1 Eq. Cas. Ab. 68.

<sup>n</sup> 3 Atk. 20.  
<sup>o</sup> 1 Eden. 502.  
<sup>p</sup> 3 Br. C. C. by Eden. 362.

and her issue, such decree will not pass the property of the husband, and if the wife survive, she will take the absolute interest in it.

As in *Phipps v. Lord Anglesea*,<sup>q</sup> where the fund, being decreed to be secured for the benefit of the wife and her issue till the husband made a settlement, was held to be the absolute property of the wife, she having survived her husband, although there was issue of the marriage. So in *Bond v. Simmons*,<sup>r</sup> where a bill having been filed by the husband for a legacy bequeathed to his wife, it was referred to the Master to receive proposals from the husband for a settlement, and the Master having certified that the husband had not made any offer to settle a provision on his wife, the Court, on the offer of the defendant, the executor, to pay the money into court, directed the accountant-general to lay it out in South Sea Annuities, for the benefit of the husband and his wife. The husband afterwards died before any further step had been taken, and Lord Hardwicke held, that the legacy survived to the wife. And in like manner, in *Macauley v. Philips*,<sup>s</sup> where a bill had been filed in the names of the plaintiff and his wife against the administrator with the will annexed of General Philips, for the residue of the testator's personal estate, to which Mrs. Macauley was entitled on the admission that there was 3000*l.* Bank Annuities of the testator unapplied, that sum was, under an order of the Court, transferred to the accountant-general. By a subsequent order it was directed, amongst other things, that the husband should lay proposals before the Master for a settlement of the Bank Annuities, and of such other parts of the residue of the testator's personal estate as might be received. The plaintiffs, husband and wife, living separate, a treaty was entered into between them, for the purpose of compromising the husband's claim on the testator's personal estate, which, after a correspondence of some months' continuance, ended

Wife's survivorship not barred by a decree, merely establishing the right, and an order for a settlement on her.

<sup>q</sup> 1 Fonb. 89.  
<sup>r</sup> 3 Atk. 20.

<sup>s</sup> 4 Ves. 15.

in the agreement of the husband to accept the terms proposed by Mrs. Macauley. However, before the agreement could be carried into effect, the husband died, without leaving issue by his wife. Mrs. Macauley then filed a bill of revivor and supplement, praying that she might be declared entitled, for her own use, to the Bank Annuities and the residue of the testator's personal estate. And the Master of the Rolls held, that the wife was entitled to these interests, not merely on the ground that the death happened before the settlement was made, but that there was no agreement binding on the interest of the wife.

However, the decision, in the case of *Packer v. Windham*,<sup>t</sup> is at variance with this of *Macauley v. Philips*, and must be considered as having been overruled by it. In *Packer v. Windham*, the facts were, that Mr. Packer had married a lady entitled to a large personal fortune by bonds and mortgages, and who had been declared a lunatic under a commission, and her person and fortune committed to the custody of one of the defendants. This marriage was afterwards declared by the Spiritual Court to be valid, and the commission of lunacy was superseded on the application of the husband; but the Court of Chancery ordered, as he had made no provision for his wife, that he should make a settlement on her, and then that her fortune should be paid to him. Mr. Packer died without having complied with the order for settlement, and Mrs. Packer died after, without issue; on which event the question arose between the respective representatives of the husband and wife as to the right to the produce of the several securities, which had been paid into court. And the Lord Chancellor decided that the representatives of the husband were entitled to it, although his wife survived him, because the money, having been paid in during the coverture, was the husband's, and the property absolutely vested in him by law; but that the Court having detained it only for the purpose of enforcing a provision for the wife, she being now dead, and no

<sup>t</sup> Prec. Chan. 412.

children to be provided for, the reason for keeping the money was at an end, and then the Court must give it to the husband's representatives, to whom it belongs.

It appears that this decree was pronounced on the ground that the payment of the wife's money into court vested the property in it absolutely in the husband. But Lord Hardwicke did not attribute such an effect to the mere payment of the money into court; his Lordship seemed to think, that it made no difference in the rights of the parties, for he said, in *Bond v. Simmons*,<sup>u</sup> "the direction here was not for the benefit of the husband, or to alter the right and property of the parties, but only to ease the executor of the burden, and ordering the accountant-general to lay it out in this manner was to secure it against the husband, subject to the further order of the Court." And Lord Alvanley expressly overruled *Pucker v. Windham*<sup>v</sup>, in the case of *Macauley v. Philips*<sup>w</sup>, saying, "it would be most extraordinary, if the Court, where it declares the property to be the property of the husband and wife only in her right, in order to give her a right to a settlement out of it, should take it from the trustee in order to give it absolutely to the husband; that the equity should be gone, and the husband have a greater interest in it when in Court, than while it was in the hands of the trustee."<sup>x</sup>

The payment of the wife's money into court does not vest the right to it absolutely in the husband.

As a decree establishing the right, followed by an order for the payment of the wife's money into court will not bar her right to it by survivorship, it follows that a mere decree, declaring the property to be the property of husband and wife in her right, will not bar her. As in *Nanny v. Martin*<sup>y</sup>, where it was ruled, that if baron and feme have a decree for money in the right of a feme, and then the baron dies, the benefit of the decree belongs to the wife, and not to the executors of the husband. Sir William Grant says,

Wife's survivorship not barred by a decree declaring money to be the property of husband and wife in her right.

<sup>u</sup> 3 Atk. 20.

<sup>v</sup> Prec. Chan. 412.

<sup>w</sup> 4 Ves. 17.

<sup>x</sup> See also the observation of Sir

Thomas Plumer in *Johnson v. Johnson*, 1 Jac. & Walk. 456.

<sup>y</sup> 1 Chan. Cas. 27. 1 Eq. Cas. Ab.

68.

in *Carr v. Taylor*<sup>z</sup>, that if the husband obtain a decree for a chose in action in his wife's right, and die before he reduces it into possession, it survives; and in *Richards v. Chambers*<sup>a</sup>, His Honour observes, that "ordinarily a decree or judgment of a court does not pass the property, but merely declares the right existing by antecedent title and disposition." And in a late case of *Adams v. Lander*<sup>b</sup>, in the Exchequer, it was held by the Lord Chief Baron, that a decree, at the suit of husband and wife for a legacy in her right, establishing the will and directing an account, was no bar to her right of survivorship.

Wife's survivorship not barred by an order for payment of interest due on her portion, which was afterwards paid to her husband.

So where a petition was presented by husband and wife in the matter of a lunatic, and it was referred to the Master to inquire and report the sum due to the petitioner on the foot of the wife's portion, and on the report being made, it was ordered that the interest and the costs should be paid, which were afterwards paid to the husband, Lord Manners held, on a bill filed by the wife, after the death of her husband, for her portion, that she was not barred of her right of survivorship by the order in the matter of the lunatic.<sup>c</sup>

As neither a decree nor an order, merely declaring the right of husband and wife in her right, will bar her title by survivorship, of course a bill filed by husband and wife for a demand in her right without any decree or order will not bar her surviving where the husband dies without any further proceeding.<sup>d</sup>

Wife's survivorship barred by an award of payment to her husband.

The wife's title by survivorship will be barred not only by a decree directing payment to the husband, but it has been also decided that an award that a sum of money shall be paid to the husband, in right of his wife, gives him the absolute property in it, and bars her survivorship.<sup>e</sup>

Wife's survivorship barred by husband's

This title of the wife by survivorship to her choses in action may be barred also by an assignment by her husband for valuable consideration,<sup>f</sup> Lord Chancellor Cowper held in

<sup>z</sup> 10 Ves. 580.

<sup>a</sup> 10 Ves. 587.

<sup>b</sup> 1 M'Lel. & Young. 41.

<sup>c</sup> Hore v. Woulfe, 2 Ball & Beatty, 424.

<sup>d</sup> Anon. 4 Atk. 726.

<sup>e</sup> Oglander v. Baston. 1 Vern. 398.

<sup>f</sup> Lord Carteret v. Paschal, 3 P. Wms. 199.

*Squib v. Wyn*,<sup>g</sup> that a mere voluntary assignment by the husband of his wife's choses in action, without valuable consideration, would bind the property and extinguish this right of the wife. However, the law seems to be now settled, that the assignment must be for a valuable consideration, otherwise the wife's right will not be disturbed.<sup>h</sup> And not only an assignment, but even an agreement to assign, where a valuable consideration has been given, will bar the wife surviving. But the assignment or the agreement to assign will not bind the wife surviving beyond the extent of the consideration.

assignment  
for valuable  
consideration.

As in *Bates v. Dandy*,<sup>i</sup> where the husband being entitled in right of his wife to two mortgages, amounting to 300*l.*, one in fee and the other for years, borrowed 200*l.* from the plaintiff, and by an agreement in writing took notice that he had, the better to secure the 200*l.* left the two mortgages with the plaintiff, and promised to assign them forthwith to him. Dandy afterwards died before any assignment by him, and the bill was filed against his wife and his administrator, and against the mortgagors, praying to be paid the 200*l.*, with the interest, or else that the mortgagors should be foreclosed. The wife insisted that the mortgages were her choses in action, and that not having been assigned by her husband, they survived to her. The administrator, on the other hand, contended, that in equity what Dandy had done amounted to an assignment, and that he was entitled to redeem the plaintiff. And Lord Hardwicke held, that "the husband being entitled to the trust of these mortgages, he had a power to assign them for his own use, and that leaving them with the plaintiff and giving his note, promising that he would procure them to be assigned, amounted in equity to a disposal of them for so much as to satisfy the debt to the plaintiff, but no more; for though he might have disposed of the whole in the manner he did, his intention was only to secure the plaintiff's debt, which

Wife's survivorship  
barred by husband's  
agreement to assign,  
where valuable con-  
sideration  
has been  
given.

<sup>g</sup> 1 P. Wms. 380.

<sup>i</sup> 2 Atk. 207.

<sup>h</sup> See Mr. Cox's note to *Squib v. Wyn*, 1 P. Wms. 380.

being done, they belong to the widow as her choses in action, and not to the husband's administrator." This case not only establishes that an assignment by the husband of the wife's choses in action for a valuable consideration is a bar to her right by survivorship, and that a promise in writing by him to assign them as a security for his debt, is equivalent in equity to an actual assignment of them, but it proves this also, that the assignment or the promise to assign for such purpose, operates as a bar to the wife's right by survivorship, only to the extent of the debt to be secured, and that the remainder of her choses in action, so assigned, or agreed to be assigned, survive to her. It further shows, that although the husband may assign the wife's term for years without any valuable consideration, yet if he only pledge it, it will not bar the wife surviving, as he did not mean to assign it out and out.

Wife's title by survivorship not barred by assignment, without valuable consideration.

But if the husband assign his wife's choses in action, without a valuable consideration, and die, she shall, notwithstanding, be entitled to them by survivorship. *Burnet v. Kinaston*,<sup>j</sup> is the leading case on this subject, the authority of which has never yet been questioned. The facts of it are these: The plaintiff's testator having married the sister of the defendant, Kinaston, her portion was secured by a mortgage in fee of part of the defendant's estate. The testator, after marriage, made an assignment of his interest in the mortgage, and by articles between him and several trustees, the money was to be called in and invested in land, to be settled to the use of husband and wife, and their issue, remainder to the right heirs of the husband. The husband and wife being both dead without issue, the plaintiff claimed the benefit of the mortgage, by virtue of the articles, as claiming under the husband. But the court dismissed the bill, because the husband had not an absolute power over the mortgage; but being in the nature of a chose in action, he had only a right to reduce it into possession, and not having so done in his lifetime, his as-



signee stood but in the place of the husband, and could have no greater right or power than the husband himself had, which was only to reduce it into possession in his lifetime; and not having so done, it survived to the wife, notwithstanding the articles, and must go to her administrator. However, if this had been a mortgage for years, the assignment would have destroyed the wife's right, as the husband can assign such an interest of the wife at law and in equity without consideration, and thereby bar both her equity and her title by survivorship.<sup>k</sup> And the reason of this peculiarity is, that terms for years are not choses in action, as they do not require to be reduced into possession, they being already in possession, and not lying in action.<sup>l</sup> And though they will survive to the wife, if the husband do no act to extinguish her right, yet he may assign them, and that will pass the interest in them, with or without consideration.<sup>m</sup>

And if even the wife herself should join in the assignment of any of her choses in action (except the trust of a term for years) without valuable consideration, it appears that her right of survivorship would be unaffected by it. As in *Wright v. Rutter*,<sup>n</sup> where husband and wife, by a deed of indenture, assigned to the defendant a legacy which had been bequeathed to her, and the deed expressed the intent of it to be, to secure a debt due to the assignee, when in fact no debt was due to him, and the assignment was really in trust for the husband, and with a view to prevent his wife from having the benefit of the money, if she should survive him. The husband died, and the bill was filed by the wife and her second husband, praying that the deed of assignment should be delivered up to be cancelled, and that they should be declared entitled in her right to the legacy. Lord Alvanley held the deed to be void, independent of any fraud, as against the wife, and that the

Assign-  
ment by  
husband  
and wife  
of her cho-  
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tion, with-  
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her surviv-  
ing.

<sup>k</sup> See the judgment of Sir W. Grant in *Mitford v. Mitford*, 3 Ves. 98. <sup>m</sup> *Packer v. Windham*, Prec. Chan. 412. <sup>n</sup> 2 Ves. jun. 673.

<sup>l</sup> Ibid.

husband could not assign the legacy without valuable consideration.

Wife's survivorship not barred by husband's voluntary assignment of a fund in court belonging to her, although she consent in court.

Wife's right by survivorship to her choses in action, not barred by the assignment produced by the bankruptcy of her husband.

And where the husband made a voluntary assignment of a fund in court, belonging to his wife, she being present in court, and being examined and consenting to the transfer, Sir Thomas Plumer held, that it did not bar her right by survivorship.<sup>o</sup>

As an assignment by the husband of his wife's choses in action without valuable consideration will not bar her right to them by survivorship, the next question is, How far an assignment by operation of law will affect this right? And it may be considered as now settled, that neither the assignment produced by the bankruptcy, or the insolvency of the husband, will defeat the wife's title by survivorship to her choses in action. It was decided very early that if a husband, entitled to a portion in right of his wife, become bankrupt, and die before it has been reduced into possession, she surviving, and not the assignees, will be entitled to it. *Parker v. Dykes*<sup>p</sup> is the first case to be met with of this nature. There a man had devised lands which were in mortgage to be sold, and the surplus of the money to be paid to his daughter. The daughter married a man who soon afterwards became a bankrupt, and the commissioners assigned this interest of the wife's. The husband died, and the assignees brought their bill against the wife and trustees to have the land sold, and the surplus of the money paid to them, but the Court would not assist in stripping the wife, (who was wholly unprovided for) but dismissed the bill. In this case, it would seem that the Court, in suffering the wife to retain the entire of her legacy, was governed chiefly by the circumstance of her utter want of any other provision; altogether, at the present day, it would be held that the legacy was hers by survivorship, the assignment under the commission of bankruptcy not having been a reduction of it into possession. So it was also in *Grey v. Kentish*,<sup>p</sup>

<sup>o</sup> Johnson v. Johnson 1 Jac. & Walk. 472.  
<sup>p</sup> 1 Eq. Ab. 54.  
<sup>q</sup> 1 Atk. 280. See a correct

statement of this case in Mr. Cox's note to Bosvil v. Brander, 1 P. Wms. 459.

where Lord Hardwicke followed the example of *Parker v. Dykes* ;<sup>r</sup> for there his Lordship held that the wife of a deceased bankrupt was entitled to the principal and interest of a sum of money, which had been bequeathed to her previous to the bankruptcy, without giving any share of it to the assignees. The facts were these : Aaron Wood gives by his will the moiety that he was entitled to of General Wood's estate to Elizabeth Clarke for life, then to Elizabeth Kentish for life, and afterwards to be divided among such of the children of Elizabeth Kentish as should be living at her decease. This sum was afterwards directed by a decree of the Court of Chancery to be laid out in South Sea annuities, and the interest to be paid according to the directions of the will. One of the daughters of Elizabeth Kentish married Crispe, who, during Elizabeth Kentish's life, assigns this legacy to one Barret for securing 150*l.* upon a contingency mentioned in the deed of assignment, which also recites the decree, and afterwards becomes bankrupt.

The contingency on which Mrs. Crispe was to have taken not having happened at the time of the bankruptcy, Barret waived his assignment and chose to come in as a general creditor, and assigned over the legacy to the assignees under the commission of bankruptcy. Crispe afterwards died in the lifetime of his wife's mother, Mrs. Kentish ; and his wife, (one of the daughters of Elizabeth Kentish,) upon her mother's death, petitioned to have her share of the South Sea annuities transferred to her, she being entitled thereto under the will of Aaron Wood. Lord Hardwicke said, that the particular assignee having taken with notice of the equity of the wife, and the assignees under the commission taking it subject to the same equity with the particular assignee, he was of opinion that it was her property, and therefore should direct the South Sea annuities to be transferred to her ; and his Lordship made an order accordingly.

Now, in these two cases of *Parker v. Dykes*,<sup>t</sup> and *Grey v. Kentish*,<sup>u</sup> it does not appear very distinctly upon what grounds it was that the Court gave the entire fund to the wife of the deceased bankrupt. In the first case, the bill of the assignees was dismissed, the Court refusing to assist in stripping the wife of the legacy, she being wholly unprovided for; from which it might be supposed to have been given to her as a provision, and not left with her as her right; and in the latter case the entire legacy was given to the wife on her petition for it; Lord Hardwicke saying, that it was her property. However, the latter authorities, which have held, that neither the bankruptcy of the husband, nor the consequent assignment of his wife's choses in action under the commission, nor the general assignment of his effects under the insolvent debtors' acts, do in themselves operate as a bar to her right of survivorship, satisfactorily show the principle on which *Parker v. Dykes*,<sup>v</sup> and *Grey v. Kentish*,<sup>w</sup> were decided. *Gayer v. Wilkinson*,<sup>x</sup> is another instance where the bankrupt husband died after the assignment, and before the reduction of his wife's choses in action into possession, and there the Court held her entitled to them by survivorship. In this case Mary Sadler, who was entitled to 2000*l.* South Sea stock, upon the death of her father, married Andrew Peirson, who, in the lifetime of Mary Sadler's father, became bankrupt. The plaintiffs were chosen assignees, and on the 13th September, 1768, had an assignment made to them of the bankrupt's estate. On the 28th of the same month, James Sadler, on whose death Mary, the wife of Peirson, became entitled to the South Sea stock, died, and afterwards the bankrupt also died. The principal question in the case was, whether the assignees of Andrew Peirson, the bankrupt, were entitled to any and what part of the said stock. The assignees insisted that the statute of bankruptcy vested the husband's right in them as effectually as if it had been

<sup>t</sup> 1 Eq. Ab. 54.

<sup>u</sup> 1 Atk. 280.

<sup>v</sup> 1 Eq. Ab. 54.

<sup>w</sup> 1 Atk. 280.

<sup>x</sup> 1 Br. C. C. 49. 2 Dick. 491.

reduced into possession ; but Lord Bathurst dismissed the bill. *Saddington v Kinsman*,<sup>y</sup> produced the same question before Lord Thurlow ; and although there was no decision upon it, yet the inclination of his Lordship's mind is very evident from the question which he put to counsel, namely, whether they knew of any case contradicting *Gayer v. Wilkinson* ? his Lordship saying, that he did not recollect any. However, the same point was again raised in *Mitford v. Mitford*,<sup>z</sup> and was most ably and fully debated, when Sir William Grant established, by the clearest and most convincing reasoning, that the assignment of the wife's choses in action by the bankruptcy of her husband, was no bar to her right of survivorship. His Honour having first stated the analogy between the rules of law and equity, as to the wife's right of survivorship, and having also distinguished between voluntary assignments and those for valuable consideration, so far as concerned the same right, put this question,—Whether an assignment in bankruptcy be of the same nature and produce the same effect as an actual assignment for valuable consideration ? His Honour said, that it might seem strange that a man should in any way be able to transfer to another a larger or better interest than he has in himself : that the interest he has in her chose in action or equitable interest, is only a right or power to reduce it into possession ; but that what is supposed to pass to an assignee for valuable consideration is the absolute right to the property, wholly freed from her contingent right of survivorship : that he had always understood that the assignment from the commission, like any other assignment, by operation of law, passed the bankrupt's right precisely in the same plight and condition as he possessed them : that even where a complete legal title vests in them, and there is no notice of any equity affecting it, they take subject to whatever equity the bankrupt was liable to : that this shows they are not considered purchasers for valuable consideration in the proper sense of these words : that it

had been long settled that assignees under a commission of bankruptcy, coming into a court of equity, to reduce the interest of the wife into possession, are bound to make such a settlement as the husband would in the same case have been compelled to make, and that if the assignment had the effect of reducing the wife's interest into possession, this equity could never have prevailed ; for that out of that of which the husband has obtained possession, no settlement can be compelled, and, therefore, that if the assignment put the assignees in possession, it would completely extinguish all the claims of the wife ; but that the Court considered the assignment as doing nothing more than to place the assignees in the room of the husband ; and that so far from considering the assignment as equivalent to possession, it was upon the very ground that the assignees want its assistance to reduce the property into possession, that the Court imposes on them the condition on which alone it would have assisted the husband to obtain the possession. This clear and able reasoning satisfactorily proves, that the assignment under a commission of bankruptcy does not reduce the wife's equitable interest into possession ; and, therefore, that if the husband die before the assignees have had the assistance of the Court to acquire the possession of them, they will survive to her.

Wife's right by survivorship to her choses in action, not barred by the assignment under the insolvent debtor's act.

The choses in action of the wife are equally unaffected by the general assignment produced by the insolvency of the husband under the insolvent acts ; and so it was decided in *Hornsby v. Lee and Others*.<sup>a</sup> In this case husband and wife assigned the interest in certain trust stock, to which she would be entitled on the death of her mother, as a security for the payment of an annuity granted by the husband. The husband afterwards took the benefit of the insolvent debtor's act, and a general assignment of his property was made under it. The wife's mother, on whose death the stock was to be vested in her, then died, and afterwards the husband died without having done any act,

<sup>a</sup> 2 Mad. C. C. 16.

or instituted any proceeding, to reduce the trust fund into possession. A bill was filed by the wife against the assignee, under the insolvent debtors' act, and the annuitant, in which she stated these facts, and prayed that the trust fund, with the dividends, might be transferred to her; or that if the court should be of opinion that either of the defendants was entitled to them, then she might be decreed to have a settlement out of them. And the late Vice-Chancellor, Sir Thomas Plumer, held, that the annuitant was not entitled to that interest, because he could have taken it only in the way in which the husband could have taken it; that if the husband had survived his wife, the assignee, the annuitant, would have been entitled to the property; but that as the husband died before his wife, the annuitant was not entitled to the property. As to the other question, namely, whether the assignee under the insolvent debtors' act was entitled to this fund, the Vice-Chancellor said that he was not, he being of opinion that the assignment under the insolvent debtors' act must produce the same, and no other effect than the general assignment in bankruptcy, which was held in *Mitford v. Mitford*,<sup>b</sup> not to pass the wife's reversionary interests, she surviving her husband.

There are, however, two cases adverse to this doctrine laid down by Sir William Grant,<sup>c</sup> and Sir Thomas Plumer,<sup>d</sup> as to the effect of assignments in bankruptcy and insolvency on the equitable interests of the wife. *Bosvil v. Brander*<sup>e</sup> is the first of them. There a feme sole being a mortgagee in fee for 800*l.*, married a tradesman, who becoming a bankrupt, a commission of bankruptcy was taken out against him, and the commissioners assigned over all his estate, real and personal. The husband died, and the writings relating to the mortgage being in the assignee's hands, the widow of the bankrupt brings a bill in equity against the assignee for these writings, and to have the benefit of the mortgage. The Master of the Rolls, Sir Joseph Jekyl,

<sup>b</sup> 9 Ves. 87.

<sup>c</sup> *Mitford v. Mitford*, 9 Ves. 87.

<sup>d</sup> *Hornsby v. Lee and others*,<sup>2</sup> Maddock, Q. C. 16.

<sup>e</sup> 1 P. Wms. 458.

having heard the case twice spoken to, delivered his opinion solemnly for the wife ; but being afterwards dissatisfied with that opinion, he ordered the decree to be stayed, and to be attended by counsel, when he gave his opinion, that if there had been any articles before the marriage, purporting that this mortgage money should continue in the wife, as her provision, or should be assigned in trust for her, they would have been a specific lien on the mortgage, and have preserved it from the bankruptcy; also, it might have been a different consideration, if the assignees had been plaintiffs in equity, and desired its aid to strip a widow, the court would hardly have lent any assistance, because, the assignees claiming under the bankrupt husband, could be in no better plight than the husband would have been ; and if the husband had in equity sued for the money, or else prayed that the mortgagor might be foreclosed, equity probably would not have compelled the mortgagor to pay the money to the husband without making some provision for his wife ; or at least the wife, by an application to the court against the husband, the mortgagor, might have prevented the payment of the money to the husband, unless some provision was made for her.

This case is certainly an authority against the wife's right by survivorship to her equitable choses in action, where the husband has been bankrupt, and no reduction of them into possession in his lifetime ; for although, as Sir William Grant observes,<sup>1</sup> all that was directly determined by it was, that the wife should not have the aid of the court to take the deeds out of the hands of the assignees, yet that decision was founded on the opinion ultimately formed by Sir Joseph Jekyl, that the right to the debt was vested in the assignees. However, it is remarkable that the question of survivorship was never once alluded to in this case ; on the contrary, his Honour mentions the only circumstance which he thought would have given the wife a right to the entire mortgage money, viz. an agree-

<sup>1</sup> *Mitford v. Mitford*, 9 Ves. 87.



ment before marriage that she should have it as a provision, or that it should be assigned in trust for her ; *that*, his Honour said, would be a specific lien on the mortgage, and have preserved it from the bankruptcy. So that it seems to have been taken for granted, without dispute, that the bankruptcy of the husband destroyed the right of survivorship.

*Pringle v. Hodgson* is another case which is adverse to the wife's claim by survivorship to her chosses in action against the assignment by bankruptcy. In this case, the wife had been entitled to 850*l.* bank stock before her marriage, and after the marriage the husband having become embarrassed, she joined him in selling out 400*l.* of the bank stock for the discharge of his debts, and he shortly afterwards joined her in a transfer of the remaining 450*l.* to trustees for her separate use, with a power to appoint. The husband, after this settlement, became bankrupt and died, and the assignees filed their bill to set the settlement aside as fraudulent and void as against the creditors, and it was accordingly set aside ; but the Court held her to be entitled not to the entire sum, but to a provision, and the plaintiffs offering to give her half of the bank stock, it was ordered to be transferred to her. It was contended on the one side in this case, that the stock not being reduced into possession by the husband, survived to the wife ; and, on the other side, that not being a fund in this Court, or in the hands of trustees, the husband was not obliged to resort to equity for it, but might have brought his action against the bank ; and that, therefore, his assignee was not bound to make any provision for the wife. But the Chancellor (Lord Rosslyn) said, "The assignee at law has a right to the chose in action of the wife, and the law reduces it into possession. The bankrupt laws give over all that the husband had or could dispose off to the assignee. The part of her property that remains is vested in assignees, and the question of survivorship is quite laid aside by the

bankruptcy. That it had been decided, that the bank holding stock in the name of a married woman was not a trustee for her." His Lordship added, "That the plaintiff did not dispute the wife's claim to a provision, but that he was obliged to come into equity to set aside the deed, which was fraudulent and void against the creditors. However, it is apprehended, notwithstanding these two cases, that the authority of *Mitford v. Mitford*,<sup>b</sup> and *Hornsby v. Lee*,<sup>i</sup> has settled the law upon the subject, that the general assignment produced by the bankruptcy or insolvency of the husband does not destroy the wife's right by survivorship to her choses in action, either legal or equitable.

Money vested in trustees for benefit of wife, if husband die without a disposition of it, she is not barred of her survivorship.

Such are the instances of the assignments of the wife's choses in action, which are now settled not to be bars to her right to them by survivorship. There are other acts respecting the wife's choses in action, which have been held to be equally ineffectual for this purpose. As where money was vested in trustees' hands for the benefit of a married woman, and the husband died, on the question, whether the wife or the executor of the husband should have it, it was decreed for the wife, the husband having made no particular disposition of it.<sup>j</sup>

Husband's possession of wife's choses in action as trustee, not such a reduction into possession as will bar her right by survivorship.

And even where the husband has got the actual possession of the wife's choses in action, if it be in the character of trustee, and not as husband, this will not be such a reduction into possession, as will defeat her right by survivorship.<sup>k</sup> As where George Hall, being executor and trustee of the will of Gregory Wright, married Elizabeth Baker, one of the residuary devisees, and afterwards died, leaving her surviving him; she died subsequently, leaving a daughter. The question was, whether the possession by Hall of the real and personal estate of the testator, as only acting executor and trustee, under the will, and disposing of part had sufficiently reduced into possession his wife's share, so as to give him an absolute title, transmissible to his personal representatives. The Master of the Rolls said, "The

<sup>h</sup> 9. Ves. 87.  
<sup>i</sup> 2 Mad. C. C. 16.

<sup>j</sup> Twissden v. Wise, 1 Vern. 161.  
<sup>k</sup> Baker v. Hall. 12 Ves. 497.

husband must be considered to have entered into possession only as trustee and executor of the will, and not as husband, and therefore his wife's share of the residue could not be deemed sufficiently reduced into possession, so as to prevent its surviving to her upon his decease, and of course going, upon her death, to her representative."

In like manner, where stock belonging to the wife has been transferred to the husband's name, and that of another person, as trustees, not with a view to appropriate it to himself, but expressly for a different purpose, it was held that such a transfer would not bar her right by survivorship. As in *Walt v. Tomlinson*,<sup>1</sup> where stock of the wife was transferred into the joint names of the husband and of the defendant, Tomlinson, upon an agreement that there should be a further transfer of it to trustees in trust for the separate use of the wife for life; and in the event of the husband's surviving, then to him for life; and, if there should be no children, then to the survivor of husband and wife absolutely. No settlement was made, and the wife having survived, and afterwards died, and there being no children living, the question arose between the executors of the husband and the legatees of the wife. And the Master of the Rolls said, "That the transfer of the stock to the husband, merely as a trustee, could not be represented as a reduction into possession, that would entitle his representatives. It was made *diverso intuitu*."

Wife's title by survivorship to stock not barred by transfer to the husband as trustee.

In *Blount v. Bestland*,<sup>m</sup> a sum of 600*l.* had been bequeathed to a married woman, and the defendant was appointed executrix. The husband died about a year after the testatrix, and his widow, the legatee, married the plaintiff, and they filed a bill claiming this legacy on the ground of the wife's right to it by survivorship. The executrix, in her answer, said, that not having the money ready to pay the husband, she offered to call in the amount of a mortgage, which was vested in her as executrix, which he declined, saying, he did not want it just then, but that

Appropriation by an executrix of a fund to pay husband interest of legacy due to him in wife's right, does not bar her survivorship.

he would rather it should lie where it was, and he to receive the interest, till he wanted the legacy. That she accordingly paid him interest at two different periods, for which he gave receipts, expressing that it was for the interest of "600*l.* left to his wife by Mrs. Brewin's will, as charged upon the estate at Whitsundine, in Rutland."

It was argued on the part of the husband's representatives, that this was an appropriation of the mortgage of the lands of Whitsundine to the husband, in satisfaction of the wife's legacy, and that it could not therefore survive. The Lord Chancellor declared that the wife, Anne Blount, was entitled to the money ; that nothing more had been done to reduce it into possession than the executor admitting the legacy to be due, and that he had assets ; that if there had been an assignment to the husband, it would have been sufficient, His Lordship added, that there had been an appropriation. but that it was the appropriation of that which was in effect a chose in action, and could only have been obtained by suit to which the wife must have been a party. In *Wildman v. Wildman*,<sup>a</sup> a married woman had become entitled, as the next of kin of an intestate, to the sum of 13,333*l.* 6*s.* 8*d.* three per cent. consolidated annuities, which was transferred by the administrator into her name, to her sole and separate use. Her husband afterwards died, never having signed any acceptance of it, and never having exercised any control over it ; on the contrary, he frequently declared that it was and should remain her exclusive property. It appeared also that there were three several transfers of part of the stock purporting to be transfers by Sophia Wildman, wife of John Wildman, and signed by her and by him underneath, and that the signature of the husband was required by the Bank in conformity to this custom, upon transfers of stock by married women. It was contended by the representatives of the husband, that the transfer of this money into the name of the wife was a payment to the husband. But the Master of the Rolls

Wife's survivorship to stock not barred by transfer into her name, husband having died without having accepted it.

held, that the transfer did not vest the property in the husband, and that, it being quite clear that he had not done any act to reduce it into possession, it followed that the claim could not be supported. And his Honour took a distinction between a transfer of stock and the payment of money, saying, "that the interest of stock was, properly, nothing but a right to receive a perpetual annuity, subject to redemption; a mere right, therefore, that the circumstance that the government was the debtor, made no difference; a mere demand of dividends as they became due, having no resemblance to a chattel moveable, or coined money, capable of possession and manual apprehension." In *Nash v. Nash*,<sup>o</sup> the father of a married woman had drawn a cheque on his bankers in favour of his daughter for 10,000*l.* which she presented at the bank on the same day, and took from them a promissory note for the money, payable on demand, and then gave it to her husband. The husband afterwards applied to the bankers for 1000*l.* of the money, which was paid to him, and he received the interest on the remaining 9000*l.* during the remainder of his life, but never was paid any more of the principal. He afterwards died, and left his wife surviving, and the bill was filed praying that the 9000*l.* might be declared to be part of his personal estate. The wife, in her answer, insisted that it formed no part of his personal estate, inasmuch as he had never reduced it into possession. And the Vice-Chancellor held, that the note given by the bankers to the wife must be considered as a chose in action, which had survived to her. This case of *Nash v. Nash* was decided principally on the authority of *Day v. Pasgrave*,<sup>p</sup> where the plaintiff, as administrator of his wife, brought debt on a bond given to her during the coverture; and on demurrer to the declaration, it was objected the action should have been brought by the husband in his own right, and not as administrator, because the wife never had any sole right of action in her. But the plaintiff had judgment on the ground, that the right to the

Survivorship to amount of cheque given by the father to his daughter, not barred by her lodging in the bank, and taking a promissory note for amount payable on demand, and handing it to her husband.

<sup>o</sup> 2 Mad. C. C. 133.

<sup>p</sup> *Philliskirk v. Pluckwell*, 2 Maul. & Sel. 396. note (b).

bond would have survived to the wife, if she had outlived her husband. And the cases of *Halloway v. Lightburne*,<sup>q</sup> and *Hodges v. Beverly*,<sup>r</sup> where it was held that accountable receipts for money, given to the wife during marriage, did not survive to her, were over-ruled.

Wife's right of survivorship to a legacy not barred by a transfer of it to trustees by her and her husband

So, if a sum of money, be bequeathed to a married woman, who is also appointed executrix, and she and her husband convey the legacy to trustees, subject to an agreement then on foot between them for settling this money, and the husband dies before the completion of the agreement, the legacy has been held to survive to the wife as her absolute property.<sup>s</sup>

for the purpose of a settlement, he dying before its completion.

Wife's right of survivorship to a bond, not barred by her husband claiming the debt under the commission of the bankrupt obligor, and paying the contribution money, the husband dying before any dividend.

And where a person, indebted by bond to a married woman, became bankrupt, the husband comes in and claims the debt, pays the contribution money, but dies before any dividend was made, the wife survives and dies also before any distribution, the Lord Chancellor directed the distribution to be made to the executors of the wife, and not to the executors of the husband, repaying to the husband's executors what was paid for contribution. The husband paying the contribution money did not alter the property of the debt, but it remained a chose in action, and survived to the wife.<sup>t</sup>

q 2 Eq. Ab. 1. 2 Mad. Rep. 135.  
r Bun. 188.

s Foot v. Foot, For. 171.  
t Anon. 2 Vern. 707.

## CHAPTER IX.

OF THE ACTS BY WHICH THE WIFE'S RIGHT BY SURVIVORSHIP TO HER REVERSIONARY CHOSSES IN ACTION MAY BE BARRED.

THE nature of the title by survivorship, which a married woman may have to her chattels real and to her choses in action has been already sufficiently explained, and the various modes by which she may be barred of this title to her choses in action presently reducible into possession, have been amply detailed in the preceding pages.<sup>a</sup> The next subject which naturally presents itself, and requires investigation, is, the mode by which a married woman may be barred of her right by survivorship to her reversionary interests, which of course, from their quality, are not capable of an immediate reduction into possession.

It has been shown in the preceding chapter, that the wife's title by survivorship to her choses in action immediately reducible into possession may be prevented by a settlement before or after marriage, by a release, a reduction into possession, by a judgment, a decree, or by an assignment by the husband for valuable consideration. It is evident, however, that some of these acts are not at all applicable to reversionary interests, for *they* cannot be reduced into immediate possession, nor can they be rendered immediately payable by a judgment recovered, or by a decree. They certainly may be purchased by a marriage settlement, and they may be released and assigned by the husband; and it is now to be inquired how far these latter acts will affect the wife's title to them by survivorship.

<sup>a</sup> Chapters VII. and VIII.

Wife's title by survivorship to her reversionary interest defeated by a settlement, and by release.

And, first, it seems that the husband may prevent this right of his wife to property of this reversionary description by his marriage settlement. This title may be defeated by a release also. Lord Holt has laid it down, that, "where the wife hath any right, or duty, which by possibility may happen to accrue during the coverture, the husband may by release discharge it."<sup>b</sup> It must be admitted that this proposition of his Lordship does not seem to have met the entire approbation of the late Master of the Rolls, Sir Thomas Plumer; for his Honour, in the case of *Purdeu v. Jackson*,<sup>c</sup> referring to this passage, which had been cited as an authority at the bar, observes, "These words, therefore, are nothing more than an *obiter dictum*, uttered upon a point totally different from that which the Court had then to decide, and by a Judge, who, in the discussion in which he uttered them, was in a minority." However, Lord Holt's position is supported by the authorities; for in *Shepherd's Touchstone*<sup>d</sup> it is said, that the husband may not only release the debt or duty which is presently payable to his wife, but even that which is not payable till a future day. And this writer refers to an anonymous case reported in 2 Rolle,<sup>e</sup> where a legacy of 10*l.* was bequeathed to a *feme covert*, to be paid eighteen months after the death of the devisor. The testator died, and after, the feme within the eighteen months, and the daughter of the wife took out administration. Montague:—"The legacy of 10*l.* does not belong to the daughter, but to the husband of the wife, for the baron had an interest in it before the time of payment accrued, which it is clear that he could have released before the time of payment accrued."

Wife's survivorship to her reversionary chose in action barred by

This title of the wife by survivorship to her reversionary interest in a sum of money, may be prevented by a payment of it to her husband in the lifetime of the person on whose death she would be entitled to it. As in *Doswell v.*

<sup>b</sup> *Cage v. Acton*, 1 Salk. 526.  
<sup>c</sup> 1 Russell, C. C. 48.

<sup>d</sup> *Sheph. Touch.* 333.  
<sup>e</sup> 2 Roll. Rep. 134.



*Earle*, where a testator bequeathed 250*l.* to his daughter Jenny Doswell, the wife of John Doswell, with directions that it should be laid out in securities, and the interest to be paid to the testator's wife during her life, and after her decease the principal to be paid to the said Jenny Doswell. Afterwards, and during the lifetime of the testator's wife, the executrix paid Mrs. Doswell's husband the 250*l.* with his wife's consent, on his undertaking to pay the widow of the testator the interest during her life. The interest was regularly paid by him during his life, and after his decease by his executors till her death. On the death of the widow, Mr. Doswell filed a bill against the executors of her husband and of her father, claiming the 250*l.* It was contended for the plaintiff, that the payment to her husband, being anticipated, was unauthorized, and a breach of trust, and that it could not amount to such a reduction into possession, as to deprive the wife of her right by surviving her husband. On the other side, the counsel relied on the power to pay the legacy to the husband at any time, and on the consent of the wife to the payment, and on her acquiescence in it for nine years after the death of her husband. The Master of the Rolls said, "The question, how far the liability of a trustee extends, and how far the exercise of his discretion bars the wife in a case where he could not have been compelled to pay any person, is a question of extensive consequence, and deserving consideration." His Honour afterwards, without further observation, dismissed the bill without costs. It is observable in this case, that, at the time the executor paid the money to the husband, the wife's interest in it, although vested, had not commenced in possession, and never was an interest in possession during the husband's life, so that it never could have been reduced into his possession; it therefore seems strange to hold, that the executor, by a breach of trust paying over to the husband a sum of money to which another was entitled for life, was thereby enabled to bar the wife's right by survivorship to the same sum of

payment of  
it to the  
husband,  
before it  
was due.

money, to which she would be entitled only on the death of the tenant for life. If the husband himself had been the executor, and had had the money in trust for the testator's widow for her life, with remainder to his own wife, that would not have been such a reduction into possession as would bar the wife's right by survivorship; such a case would be within the principle of those decisions, in which it was held, that, where the husband has got the possession of his wife's choses in action in the character of trustee or executor, it does not amount to such a reduction into possession as will bar her right by survivorship.<sup>g</sup> In the principal case, the husband received the money from the executor, on the terms of paying the interest to the tenant for life, and was, therefore, as much a trustee for her and for his wife in remainder, as if he had been appointed by the testator; and, consequently, his possession in this character could not affect the wife's right.

*Quer.* Can wife's right by survivorship to her reversionary choses in action be barred by assignment for valuable consideration?

It has been already shown that one of the modes by which the husband may bar his wife's right by survivorship to her choses in action *presently* reducible into possession, is by an assignment for valuable consideration. It has become a subject of discussion lately, whether he can bar this right to her reversionary choses in action by such an act, and the better opinion seems to be that he cannot.<sup>h</sup> *Theobalds v. Duffoy*,<sup>i</sup> is a case relied on by those who support the affirmative of this proposition. There a *feme sole* having a term for 500 years devised to her for the residue thereof, after an estate for life limited to A., marries, and with her husband and consent of her relations, for valuable consideration, sold the remainder of the term to J. S. A. dies during the term, then the *feme*, with her husband, sold the term to J. N., who recovering the same at common law, the first sale being void (being of a possibility), J. S., the first vendee, exhibited his bill for an injunction. The question was, whether an assignment of a possibility of a

<sup>g</sup> *Baker v. Hall*, 12 Ves. 497.  
*Wall v. Tomlinson*, 16 Ves. 415.

<sup>h</sup> *Purdew v. Jackson*, 1 Russel's C. C. 1.  
<sup>i</sup> 9 Mod. 102.

term shall be carried on in equity against a verdict at law, without a sufficient equitable consideration, viz. 30*l*. Parker, Lord Chancellor, said, " Though in the principal case this should be accounted a bare possibility, and not assignable at law, yet since the defendant herself had assigned this possibility for a valuable consideration, and would now impeach it, because it was an interest not assignable at the time, though it has since vested in possession, this seems contrary to good conscience, and a case wherein this Court will interpose, and hinder her proceedings at law." And a perpetual injunction was granted against the second vendee, and that the first should have the term. However, this decision does not prove that the husband has the power of defeating his wife's right by survivorship to her reversionary interests by an assignment for valuable consideration; for the question did not arise between the surviving wife relying on this title, and the assignee of her husband, for she and her husband were both living when the tenant for life died, and when the term became an interest in possession; besides, as the interest was a term for years, the wife would have been barred of her right by survivorship by the second assignment, even if it had been without a valuable consideration. So that, in fact, this case decides nothing upon the present subject. The *Duke of Chandos v. Talbot*, is another case cited in support of the above proposition. There a legacy of 1000*l*. was bequeathed to a woman, payable at her age of twenty five years, which was assigned by her and her husband before she arrived at this age; and Lord Chancellor King was of opinion that the assignment was valid. It is to be observed of this case also, that the question as to the wife's right by survivorship, did not arise in it, the husband and wife being both living at the hearing of the cause, and she having arrived at the age of twenty-five years, and that the only point decided in it was, that an assignment by the husband *alone* of such an interest would be valid, and that it was not necessary for

the wife to join in it to give it validity : so that these two cases decide only, that the husband may assign his wife's reversionary interests, and that, if they become vested in possession *during her life*, the assignment is valid. The opinion of Lord Hardwicke also, in *Grav v. Kentish*,<sup>k</sup> is relied on as an authority in support of the husband's power to destroy his wife's right by survivorship to her reversionary choses in action, by an assignment for valuable consideration. His Lordship's language was, "A husband cannot assign in law a possibility of the wife, nor a possibility of his own ; but this Court will notwithstanding support such an assignment for valuable consideration ; though I do not know any case where a person claiming under a particular assignee has been obliged to make such a provision as is prayed here." it is quite evident that this language does not refer to the wife's right, but was intended merely to distinguish between an assignment of a possibility for valuable consideration at law and in equity, that the former would be inoperative, while a court of equity would sustain the latter. His Lordship did not speak of the wife's possibility only, but generally of any one's possibility : for the words are, "a husband cannot assign in law a possibility of the wife, nor a possibility of his own ;" clearly meaning, that equity would support an assignment of the wife's or of the husband's possibility for valuable consideration, as between the assignor and assignee ; but that his Lordship did not mean to say, that the husband could bar the wife's right by survivorship to her reversionary choses in action by an assignment for valuable consideration, is demonstrated by this circumstance, that he actually decided in this very case, that the wife of one Crispe<sup>l</sup>, who had assigned his wife's reversionary legacy as a security for a sum of 150*l.* and afterwards became bankrupt, was entitled by survivorship to the legacy, it not having been reduced into possession in the husband's lifetime ; so that this case is to be classed amongst the authorities against the husband's power to bar the wife's

<sup>k</sup> 1 Atk. 280.

<sup>l</sup> See Mr. Cox's note to *Bosvil v. Brander*, 1 P. Wms. 459

right by survivorship to her reversionary interests by an assignment for valuable consideration. The same Judge, Lord Hardwicke, said also, in *Hawkins v. Clyn*<sup>m</sup>, "I will not say, but the husband might have disposed of this possibility in equity, if assigned for valuable consideration; but then that must have been upon an actual assignment of this particular thing; and here it rests upon the intention of the parties, and the construction of the words of the covenant:" and this passage has been relied on as favourable to the husband's power to bar his wife's right by survivorship. However, the subject of assignment for valuable consideration did not arise in this case, for the husband had not assigned; but the only question was, whether the wife was entitled, under a covenant in her marriage settlement, to the interest of a sum of 2000*l.* In *Atkins v. Dawberry*,<sup>n</sup> a man by his will gives a legacy of 300*l.* to a *feme covert*, payable out of a reversion of land expectant on an estate for life. The husband of the legatee made an assignment of this legacy in trust for the benefit of his children, and afterwards by his will devised it in like manner for the benefit of his children, and makes his wife administratrix; and on a bill filed by the children for the amount of this legacy, the Court held, that forasmuch as the husband, who had a power to extinguish or release this legacy, had made a good assignment of it in equity, it was actually recovered; and having again by his will confirmed that assignment, and given it again in the same manner, bound the wife the legatee. It is to be remarked, that the husband's assignment in this case was voluntary, and not for valuable consideration; so that the decision is, that the husband may bar his wife's survivorship to her chuses in action by a mere voluntary assignment, which is not the law at present. However, this case was abandoned by the counsel, who cited it as an authority in *Purdeu v. Jackson*,<sup>o</sup> and was pronounced by the Court not to be law.

<sup>m</sup> 2 Atk. 551.

<sup>o</sup> 1 Russ. C. C. 40.

<sup>n</sup> Gilbert's Rep. in Equity, 88.

All the modern decisions on this subject deny an absolute power in the husband to bar his wife's right of survivorship to her reversionary interests by an assignment of them for valuable consideration. There are some cases, however, in which such an assignment has been held to operate as a complete extinguishment of this right of the wife, where she herself had consented to it on her examination in court. Lord Alvanly, in two different instances, decreed execution of a contract for the purchase of the wife's reversionary interest in personal chattels, she being in court and consenting. The cases were *Hewit v. Croucher*,<sup>p</sup> and *Gregg v. Croucher*,<sup>q</sup> in which husband and wife by their bill prayed the specific execution of a contract for the purchase of the wife's reversionary interest in stock; and Lord Alvanly decreed accordingly, the wife being present in court, and being examined, and desiring that the contract should be carried into execution. But the authority of these decisions was considerably shaken on a subsequent occasion by Sir William Grant, who, when they were cited as precedents for his guidance in a case similarly circumstanced, would take the consent of the wife only *de bene esse*, leaving open the question as to her right by survivorship, and expressing very strong doubts as to the power of the Court to preclude by anticipation, taking the wife's consent, the question which may arise upon it. His Honour said, "My doubt is, that this is not the common case for taking the examination. The ordinary occasion for that is, where the husband applies to have paid to him money that belongs presently and immediately to his wife. Her equity is not to prevent his receipt of it, but to have a settlement, and the Court requires her consent to the payment to him without a settlement. But in this instance the object is not to bar her equity to have a settlement, but to bar her right to survivorship, for upon his death it belongs to her entirely. She is giving up not her equity only, but her entire right by survivorship. That is not the

Wife's  
right by  
survivor-  
ship to re-  
versionary  
interests  
not barred  
by her con-  
sent in  
Court.

<sup>p</sup> Cited in *Woollands v. Croucher*. <sup>q</sup> *Ibid.*  
12 Ves. 175.

case in which the court takes her consent." However, notwithstanding this unequivocal opinion, his Honour, in the subsequent case of *Howard v. Damiani*,<sup>r</sup> took the consent of a married woman, not *de bene esse*, but absolutely, that a sum of money to which she would be entitled on the death of the plaintiff, should be paid to him immediately, he having purchased it from her husband; and it was decreed that the money should be paid by the trustees to the purchaser. But this opinion is so much at variance with the deliberate judgment pronounced by his Honour in *Woollands v. Croucher*,<sup>s</sup> that it strongly favours the presumption of some mistake in the statement of facts, as they appear in the report of *Howard v. Damiani*. At all events, even if this be a correct report of his Honour's decision, this much is proved by the above cases, that both Lord Alvanley and Sir William Grant were of opinion that the husband could not, *by himself*, bar the wife's right by survivorship to her reversionary chuses in action, but that her consent, on examination in court, was necessary to defeat her future claim, and to give complete effect to his disposition of them; for if their Honours thought the husbands had the power to bar their wives' right of survivorship by an assignment for valuable consideration, they would not have taken the wives' consent in addition. However, Sir John Leach has overruled these cases so far as it was decided by them, that the consent of the wife could be taken to bar her right by survivorship. This decision took place in *Pickard v. Roberts*,<sup>t</sup> where the wife, being entitled to a sum of money on the death of her mother, to whom the interest was payable during her life, the mother, the daughter, and the husband, petitioned the court that the reversionary interest, to which the wife would be entitled on the death of her mother, might be paid to her husband, the mother having made a gift of her life interest to him. But the Vice-Chancellor refused the prayer of the petition, saying, that "his opinion was, that a wife by her consent

Consent of wife to pass her reversionary interest to her husband, cannot be taken in equity.

<sup>r</sup> In a note to *Ritchie v. Broad-*  
*hent*, 2 Jac. & Walk. 458.

<sup>s</sup> 12 Ves. 174.  
<sup>t</sup> 3 Mad. C. C. 384.

in a court of equity could only depart with that interest which is the creature of a court of equity, the right which she has in a court of equity to claim a provision by way of settlement on herself and children, out of that property which the husband at law would take in possession in her right. That if the wife, by her consent in court, could pass a remainder or reversion in personal property to the husband, she would not only part with a future possible equity, but with her chance of possessing the whole property by surviving her husband; and to give this effect to her consent, would make it analagous to a fine at law, with respect to real estate, a principle always disclaimed in a court of equity." It must be observed, that there was no assignment by the husband for a valuable consideration or otherwise, in this case, but the whole object of the petition and consent was to transfer the wife's reversionary interest to the immediate possession of her husband; so that the effect of an assignment of this interest for valuable consideration was not the subject of discussion. The decision did not turn upon the want of an assignment for valuable consideration, but on the want of power in the Court to take the wife's consent to deprive herself of her chance of survivorship to her reversionary interests, whether there was an assignment of them or not.

Wife cannot bar her right by survivorship to her reversionary interests by deed.

As the wife cannot bar herself of her right by survivorship to her reversionary interests by her consent in court in favour of her husband, neither can she do so by her deed upon a separation between her and her husband, by which she agrees that he shall have a certain share of her contingent property when it shall fall into possession."<sup>u</sup>

Thus it appears that the wife will not be permitted to exclude herself from her title by survivorship to her reversionary interests in personal property by her consent in court, either in favour of a purchaser for valuable consideration,<sup>v</sup> or of her husband,<sup>w</sup> or by her deed in her

<sup>u</sup> *Stamper v. Barker*, 5 Mad. C. C. 157.

<sup>v</sup> *Woollands v. Croucher*, 12 Ves 174.

<sup>w</sup> *Pickard v. Roberts*.



husband's favor.<sup>x</sup> But, as well the cases, in which the consent of the wife was admitted to bar her future rights, upon the assignment of them for valuable consideration, as those in which it was rejected, prove that the judges, who decided them, were of opinion that the husband could not bar these rights by a mere transfer for valuable consideration; for if he could do so, then it was useless to reject or admit the consent, which could produce no additional effect. In *White v. St. Barbe*,<sup>y</sup> Sir William Grant expressly said, "A husband can dispose of such property in expectancy against every one, but the wife surviving;" that is, in other words, that the husband could not bar the wife surviving by any disposition of the property. This, no doubt, was a mere *obiter dictum* of his Honour; but the point was directly decided by Sir Thomas Plumer, in *Hornsby v. Lee and Others*,<sup>z</sup> in which husband and wife assigned a reversionary interest of the wife in government stock, as a security for the payment of an annuity granted by the husband. The person, on whose death the wife was to take, dies, and then the husband dies, the stock not having been reduced into possession, and Sir Thomas Plumer held, that the wife was entitled to the fund by survivorship; on this reasoning, that the husband has a right to his wife's choses in action, provided he reduces them into possession during his lifetime; that a deed, assigning a reversionary interest, is not an actual reduction into possession, because it is impossible to reduce a reversionary interest into possession; and that it is not a constructive reduction into possession, because its only effect is to place the assignee in the same situation as the assignor; that is, if, the husband survive the wife, the assignee is entitled to the property; if, on the other hand, the wife survive, she takes it; that the wife having survived in the present case, she, and not the assignee, was entitled by survivorship.

Husband cannot bar wife's right by survivorship to her reversionary interests by an assignment for valuable consideration.

Notwithstanding this decision, the question was again raised in the case of *Purdew v. Jackson*,<sup>a</sup> before the same

<sup>x</sup> 5 Mad. C. C. 157.  
<sup>y</sup> 1 Ves. & B. 405.

<sup>z</sup> 2 Mad. C. C. 16.  
<sup>a</sup> 1 Russ. C. C. 1.

Judge, Sir Thomas Plumer, when his Honour, having heard the case argued twice at his own desire, decided in conformity with his former opinion in *Hornsby v. Lee*. In the present case, husband and wife had assigned to a purchaser for valuable consideration a reversionary interest of the wife in the funds. The husband first died, and afterwards the tenant for life, on whose death the wife was to become entitled to the possession of the fund; the widow married, and on the petition of her and her husband to have the fund paid to them, and on the petition of the assignee of the first husband, claiming as a purchaser, for valuable consideration, the question arose as to the power of the husband to bar the wife's right by survivorship to such an interest by an assignment for valuable consideration. The counsel for the assignee directly impeached the authority of the decision in *Hornsby v. Lee*,<sup>b</sup> denying it to be law, and saying that it never had been acquiesced in by the profession. However, his Honour, after a most patient hearing, and a laborious examination of all the cases bearing on the subject, decided, as before, against the assignee. His Honour in his judgment, said, "The law of marriage gives the wife's choses in action to the husband, on condition that he reduce them into possession during its continuance; if he die before his wife, without having done so, she takes them by survivorship. How, then, his Honour asks, can he bar her right by survivorship by an act, which is not a reduction into possession, and that too at a time, when it is impossible, from the reversionary nature of the chose in action, that it should be reduced into possession? That if it be said that her right may be barred by something short of a reduction into possession namely, an assignment for valuable consideration, we must alter the doctrine laid down in our books. It will no longer be true, that the husband shall not have the chattels personal of the wife lying in action, unless he reduce them into possession during the marriage. That the effect of an assignment for a valuable

<sup>b</sup> 9 Mad. C. C. 16.

consideration operates no otherwise, than by putting the assignee in the place of the assignor; that the assignor cannot give to another a power which he himself does not possess; and therefore, that where the wife has a chose in action, which the husband himself cannot recover, he cannot assign over to another the right to reduce it into possession. That the husband's right is merely a right to obtain possession of the subject, when the period arrives at which the wife is entitled to the possession of it, and if he die in the mean time, leaving his wife surviving, his right is gone, and the right of the surviving wife takes effect. The assignee for valuable consideration must take the right as the husband himself had it; he buys the chance of the husband's outliving the wife, or of the reversionary chose in action falling into possession during the coverture, and he must wait to see how the event turns out. That in this case the husband had died before the chose in action had been reduced into possession, the assignee had therefore lost all chance of recovering it, and the wife took it by her right of survivorship."

Such is the substance of the judgment of the Master of the Rolls on this important case, from which, as there has been no appeal, it is to be supposed that it has settled the law upon the subject. And if the question is to be considered on principle only, without reference to any dictum or decision on either side of it, the reasoning of Sir Thomas Plumer must appear to be unanswerable. It must, however, be admitted, that the strongest arguments, urged against the assignment for valuable consideration of the wife's reversionary interests operating as a bar to her right to them by survivorship, apply with as much force to the case of a similar assignment of her choses in action *presently* reducible into possession, which is at present held to be a bar to her right by survivorship, although they should not have been reduced into possession in the lifetime of the husband. If the husband cannot bar the wife of her right by survivorship to her reversionary interests by an assignment for valuable consideration, they not having been

reduced into possession in his lifetime, why should he be able, by a similar act, to bar her survivorship to choses in action, capable of an immediate reduction into possession, if they should happen not to have been reduced into possession during his life? Is there not in the one case, as well as in the other, the absence of that ingredient which the law requires to complete a bar to the wife's right by survivorship, namely, a reduction into possession? Besides, is not the objection arising from the want of power in the husband to place his assignee in a better situation with regard to the wife's choses in action than himself, as valid with respect to those which are presently reducible into possession, as to those which are reversionary? Indeed, it does appear that it was not always the law, that an assignment, for valuable consideration of the wife's choses in action, presently reducible into possession, would defeat the right of the wife surviving; for in *Burnett v. Kinston*,<sup>c</sup> the Lord Keeper says, "If a husband assigns a bond of his wife for valuable consideration, this assignment will not bind the wife, if she survives." It certainly has been held to be the law for a series of years, that an assignment for valuable consideration by the husband of his wife's choses in action immediately reducible into possession, is a bar to her title by survivorship; and it may be now too late, as Sir William Grant has intimated,<sup>d</sup> to consider the subject, with a view to alteration. However, if, as is above submitted, the reasoning which denies this effect to the assignment of the reversionary choses in action of the wife would be equally applicable to her choses in action, which are not reversionary, it is much to be regretted that the rule respecting both should continue to be different. (1)

(1) The reader's attention is particularly directed to the notes of Mr. Russell, annexed to his report of the case of *Pudew v. Jackson*, (e) as they contain much valuable information on the subject of this chapter.

<sup>c</sup> Prec. Chan. 121. Freem. 241.

<sup>e</sup> Russ. 1.

<sup>d</sup> 1 Jac. & Walk. 476.

## CHAP. X.

OF THE EFFECT OF MARRIAGE ON THE RESPECTIVE ACTS OF  
HUSBAND AND WIFE PREVIOUS TO IT.

THE preceding part of this treatise has shown the various consequences produced by marriage on the properties of husband and wife respectively, and the interest which each takes in the possessions of the other by virtue of this new relation. It is now proposed to show the effect which marriage has on the acts, to which husband and wife were respectively parties with strangers, and also on those acts and engagements which they had entered into with each other before their intermarriage. And, first, as to the acts of the husband with strangers antecedent to his marriage; all such acts of his, although they may have been in their nature revocable, remain unaffected by this subsequent event. Whatever engagements he may have entered into, or whatever proceedings he may have commenced at law or in equity, they continue unaltered and unabated after his marriage. But if a man, being a bachelor, or a widower without children, make a will, it is settled that such instrument will be revoked by his subsequent marriage and the birth of issue,<sup>a</sup> even though the issue should be posthumous.<sup>b</sup> However, this principle does not rest on the notion of any supposed incapacity in the testator to do this, or any other act disposing of his property, nor on the ground of an intention to alter his will, implied from the circumstances of his afterwards happening to marry and to have issue; but, as Lord Kenyon has expressed it,<sup>c</sup> on

Husband's unconditional acts with strangers before marriage, unaffected by subsequent marriage.

<sup>a</sup> 2 Fonb. 355, and Mr. Eden's note to *Hodsden v. Loyd*, 2 Br. C. C. 540.

<sup>b</sup> *Lancashire v. Lancashire*, 5 T. R. 49.

<sup>c</sup> *Ibid.* 58.

a tacit condition annexed to the will itself at the time of making it, that he does not then intend that it should take effect, if there should be a total change in the situation of his family.

Acts of a woman *dum sola*, which are revoked by marriage.

Warrant of attorney by a woman *dum sola*, revoked by marriage.

Warrant of attorney to a woman *dum sola*, not revoked by marriage.

The acts of a woman *dum sola*, which are capable of being discontinued or recalled, are, in some instances, absolutely revoked by her subsequent marriage, and, in others, they are not revoked, but their continuance depends on the husband, to whom she has transmitted her power, and submitted herself and her will. And, first, as to her acts with strangers:—if a woman *dum sola* execute a warrant of attorney to confess a judgment, and afterwards marry before the judgment has been entered, the warrant is countermanded, and judgment shall not be entered against husband and wife, for that would charge the husband.<sup>d</sup> There is an anonymous case in Shower,<sup>e</sup> in which it is stated to be the practice to enter up judgment against husband and wife, where a warrant had been given by her before her marriage; but the above cited case from Salkeld, seems to be more conformable to principle, and to the present practice. If indeed a warrant of attorney be given to a woman *dum sola*, who afterwards marries, it will not be revoked by her subsequent marriage.<sup>f</sup> And the reason of the difference is, that the warrant executed by the *feme sole*, if not revoked by her subsequent marriage, would be an authority to charge her after-taken husband; but the same power given to a woman *dum sola*, would operate only to his advantage. However, although the warrant, given to a woman *dum sola*, is not revoked by her marriage, yet judgment cannot be entered upon it afterwards, even within a year from the date of the warrant, without the leave of the Court; if it be, it will be set aside.<sup>g</sup> And the same rule was acted on in *Nietcalfe v. Boote*,<sup>h</sup> where the only question made was, whether it was necessary to swear

d 1 Salk. 399.  
e 1 Show. 91.  
f 1 Salk. 117.

g Marder and Wife v. Lee, 3 Bur. 1469.  
h 6 Dowl. & Ry. 46.

to the due execution of the warrant by the defendant, and that the debt was still unpaid. And Mr. Justice Holroyd held it to be necessary to verify both facts by affidavit.

So if a *feme sole* seised in fee of copyhold lands, surrender them to the use of her last will and then marry, the surrender is void, or at least suspended during the marriage.<sup>j</sup> In like manner, a submission to arbitration entered into by a *feme sole* will be revoked by her subsequent marriage. As if A. on the one part, and B. and C. a *feme sole* on the other part, submit themselves to the award of J. N., and afterwards C. takes J. S. to husband, and afterwards the arbitrator before any notice of the marriage makes an award that B. and C. shall pay 30*l.* to A. ; yet this shall not bind J. S. and C. his wife, nor B. for the submission by the marriage of C. is revoked as to B. also, and this without any notice.<sup>j</sup>

The will also of a *feme sole* is revoked by her subsequent marriage, because it is of the essence of a will that it should be valid during the remainder of the devisor's life,<sup>k</sup> which cannot be the case with a woman after her coverture ; for when she enters into that engagement, she gives up the right to her own property ; consequently, even if she should survive her husband, her will made previous to the marriage would not be thereby restored to operation. And where a *feme sole* made a will and then married the devisee, and died during the coverture, the marriage has been held to be a countermand of the will, although it would have been so much the advantage of the husband that it should continue in full force. This was *Forse and Hembling's* case,<sup>l</sup> where it was unanimously agreed, that by the taking of husband and coverture at the time of her death, the will was countermanded for these reasons ; first, "The making of a will is but the inception of it, and it doth not take any effect till the death of the devisor ; then it would be against the nature of a will to be so absolute that he who makes it, being of good and perfect memory,

Will of  
*feme sole*  
revoked by  
marriage.

<sup>i</sup> George v. ———, Amb. 627.  
<sup>j</sup> 1 Rol. Ab. 331.

<sup>k</sup> Cotter v. Layer, 2 P. Wms. 624.  
Doe v. Staple, 2 T. R. 659.  
<sup>l</sup> 4 Coke, 60.

cannot countermand it ; and therefore this taking of husband, being in the case at bar her proper act, shall amount to a countermand in law. Secondly, Because it would be mischievous to women, that after their intermarriages they could not for no cause countermand their wi'ls." And, even where there is an agreement that the wife may dispose of an estate by will, a will made before the marriage, although subsequently to the agreement, will be revoked by the marriage, unless expressly authorized by the articles made before marriage.<sup>m</sup> And Mr. Justice Ashurst expresses a doubt, in *Doe v. Staple*,<sup>n</sup> whether it could have been agreed that the marriage should not revoke the will, even if there had been words for that purpose, because it would have been a stipulation in direct opposition to a positive rule of law.

Revocable  
acts of  
wife *dum*  
*sola*, which  
are not re-  
voked by  
marriage.

Lease at  
will by  
*feme sole*  
not re-  
voked by  
her mar-  
riage.

However, although a warrant of attorney to confess a judgment, and a will executed by a *feme sole*, are revoked absolutely by her subsequent marriage, yet every revocable act done by her is not countermanded by such an event. The benefit which the husband may derive, or the injury he may sustain, seems to be the governing principle in deciding, in many instances, whether the revocable act of his wife, *dum sola*, shall or shall not be countermanded by her subsequent marriage. As in *Henstead's case*,<sup>o</sup> where a woman, tenant for life of a house and certain land in Kent, made a lease at will, rendering rent, and afterwards took husband, and she and her husband brought an action of debt for the arrearages after the marriage ; and if the lease at will were determined by the intermarriage, or not, was the question. And it was agreed by the whole Court, that the will was not determined by the intermarriage, for although the woman had by marrying submitted herself to the will of her husband, as her head, yet forasmuch as it might be prejudicial to the husband to have the lease determined, for then he would lose the rent to be paid at the next day

<sup>m</sup> *Hodsdon v. Loyd*, 2 Br. C. C. 534. <sup>n</sup> 2 T. Rep. 697.  
<sup>o</sup> 5 Coke, 10.  
534. *Doe v. Staple*, 2 T. Rep. 684.  
*Sugden on Powers*, 152.



after the marriage ;<sup>p</sup> and it could not be in any manner prejudicial to the wife if the lease continue, but rather to her benefit. And, generally, it might be great prejudice to all husbands, who intermarrying with women who have tenants at will, for the losing of their rents. For these causes it was resolved, that without express matter done by the husband after the marriage to determine the will, it is not determined. And the law is the same if a lease be made to a woman at will, and she marries, the will continues notwithstanding the marriage, and the lessor may have an action, or may distrain them for the rent.<sup>q</sup> So if a *feme sole* make a lease for life or years, reserving a rent, and grant the reversion in fee, and marry, this is a countermand of the attornment, because it is for the benefit of the husband that it should be so.<sup>r</sup> But if a *feme sole* make a lease for life, rendering rent, and afterwards by her deed grant the reversion to another, and afterwards, and before attornment, marry with the grantee, this marriage was held not to be a countermand of the attornment, and thereby the payment of the rent by the tenant to the husband in the name of attornment, the reversion passed out of the wife to the husband, because it is for the benefit of the husband that the marriage shall not be a countermand of the attornment.<sup>s</sup>

Lease at will made to a feme sole not revoked by her marriage.

The foregoing cases afford instances of the effect produced by marriage on the acts of husband and wife respectively with *strangers*, while they were sole. The effect of marriage on engagements entered into with each other before they were married, is now to be considered ; and if either be indebted to the other for a preceding debt, while they are *sole*, their subsequent intermarriage will work a release of it on this principle, that husband and wife are but one person ; as, if the *feme* obligee take the obligor to husband, this is a release in law.<sup>t</sup> The like law is, if

If feme obligee take the obligor to husband, it is a release in law.

<sup>p</sup> See Co. Lit. 55 b. note 374.

<sup>q</sup> 5 Coke's Rep. 10. Co. Lit. 53 b.

<sup>r</sup> Forse and Hembling's case, 4

Coke's Rep. 60. Co. Lit. 310 b.

<sup>s</sup> Ibid.

<sup>t</sup> Co. Lit. 264 b.

If a feme cestuique trust of a bond marry the obligor, it is not a release in equity.

Bond to feme sole by her intended husband not payable during his life, not released by the marriage.

there be two femes obligees, and one of them take the debtor to husband;<sup>u</sup> but if a feme executrix take the debtor to husband, this is no release in law; for that would be a wrong to the dead, and in law work a devastavit, which an act in law shall never work. But if a woman, being cestuique trust of a bond, marry the obligor, it will not be considered as a release in equity, as it would be at law, if the obligee herself had married the obligor; for which the Court gave this reason, in *Cotton v. Cotton*,<sup>v</sup> that the husband himself, being obligor, and so privy to the trust for his wife before marriage, makes it like the case where a man joins with the woman he is about to marry, in assigning her personal estate in trust for herself, in which case he shall not have the benefit of it. However, a distinction is to be observed between an obligation entered into for a precedent debt, without any reference to a subsequent intermarriage between the parties, and where it is contracted with a view to it, and in consideration of it, the payment of the debt depending on a contingency which may never arise, and which cannot arise during the marriage: as in *Cage v. Acton*,<sup>x</sup> where, before marriage, the intended husband gave a bond to his intended wife for 2000*l.*, conditioned that if the wife, the obligee, should survive the obligor, then the obligor should leave to the obligee 1000*l.*, or his heirs, executors, or administrators, should pay that sum within a certain period after his death, then the bond should be void; it was held by Justices Turton and Gould, Lord Holt dissenting, that the marriage did not extinguish or release this debt; on this ground, that being in contingency during the coverture, it could not be released. A writ of error was afterwards brought on this judgment; but the plaintiff in error, perceiving the Court above inclined to affirm it, did not proceed.<sup>y</sup> This case was afterwards acknowledged and acted on as law in *Milbourne v. Ewart*,<sup>z</sup> where an action

<sup>u</sup> Co. Lit. 264 b.

<sup>v</sup> Ibid.

<sup>w</sup> Prec. Chan. 41. 2 Vern. 290.

<sup>x</sup> 1 Ld. Raym. 515. Comyn's Rep. 67. Salk. 325.

<sup>y</sup> Ld. Raym. 523.

<sup>z</sup> 5 T. R. 381.

was brought by the widow of J. Milbourne against his heirs on a bond for 6000*l.* executed by her husband to her before the marriage. Oyer was prayed of the condition, which was "for payment of 3000*l.* by the heirs or executors of the obligor to the plaintiff, her executors, &c. &c., at the expiration of twelve months after the death of the obligor." The defendants pleaded that after the execution of the bond, the obligor "took to wife and intermarried with the plaintiff." plaintiff replied, that the bond was made in contemplation of a marriage between her and the obligor, and with an intent that in case the marriage should take effect, and the plaintiff should survive him, she should have the full benefit and effect thereof. To this replication the defendants demurred, and the demurrer was overruled without hearing counsel in support of the replication, all the judges citing the foregoing case of *Cage v Acton*, as being directly in point; and Lord Keynon expressing his regret that Lord Holt had recourse to such flimsy and technical reasoning to enforce a case so directly against law and conscience. So that it appears that a bond executed by a man to a woman in contemplation of marriage, conditioned for the payment of money after the termination of the marriage, is not released or extinguished even at law by the subsequent coverture, although it should not appear on the face of the instrument that it was intended as a provision for the widow.

And even a promise by a man to a woman, that if she would marry him and he should die before her, he would leave her worth 100*l.*, is not released by the subsequent marriage. So it was ruled in *Smith v. Stafford*,<sup>a</sup> by three Justices against the opinion of Lord Hobart, who thought the promise was discharged by the marriage. And in *Clark v. Thompson*<sup>b</sup>, where a man, in consideration the plaintiff would marry him, promised he would leave her worth 500*l.*, it was decided that this contract was not determined by the subsequent marriage; and, therefore, that an action was maintainable at her suit, against the executor of her hus-

A promise by a man to a woman to leave her worth a certain sum, not released by their subsequent marriage.

<sup>a</sup> Hob. 216.

<sup>b</sup> Cro. Jac. 571.

band. There was a verdict for the plaintiff in this case, and a motion made in arrest of judgment, and the judgment was for the plaintiff, which was afterwards affirmed on a writ of error in the Exchequer Chamber, on which occasion the above-mentioned case of *Smith v. Stafford* was cited and relied on by Justice Winch.

Promise or covenant by a man to a woman for the performance of an act during their intended marriage, revoked by it at law, though not in equity.

But if the promise or covenant by a man to a woman, or *vice versa*, while they are sole, be in contemplation of marriage, and for the performance of any act during its continuance, then, indeed, the contract is void at law, but a court of equity would consider the instrument as evidence of the agreement of the parties, and enforce a specific execution of it. In *Cannel v. Buckle*,<sup>c</sup> a *feme sole* gave a bond to her intended husband, that in case of their marriage she would convey her lands to him in fee. They afterwards married; the wife died without issue, and afterwards the husband died; and on a bill by the heir of the husband against the heir of the wife, to compel him to convey the wife's lands, Lord Macclesfield held, that the bond was a written evidence of the agreement of the parties, that the *feme* in consideration of marriage, agrees the man shall have the land as her portion, and this agreement being upon a valuable consideration shall be executed in equity. His Lordship considered it to be unreasonable, that the intermarriage upon which alone the bond was to take effect, should itself be the destruction of the bond. So in *Furzor v. Penton*<sup>d</sup>, where a man before marriage covenanted with his intended wife that she should have power to dispose of 300*l.* of her estate notwithstanding the intermarriage. The husband afterwards brought his bill against the defendant, in whose hands the 300*l.* was; setting forth, that if there was any such agreement with his wife, the same was discharged by the intermarriage. It was insisted for the defendant, that though the covenant was improvidently taken in the name of the wife, whereas it ought to be in the name of trustees; and though it should be admitted that:

the marriage, in strictness of law, had discharged the covenant, yet a court of equity would never suffer a trust to be so defeated. And the Court inclined to dismiss the bill, but adjourned the cause till the next term, the plaintiff's counsel alleging, that the wife consented that the money should be paid to her husband. In *Acton v. Pierce*,<sup>e</sup> also, the Court of Chancery gave effect to a bond which a husband had executed to his wife *dum sola*, although it had been released at law by the intermarriage. There is one case, however, adverse to this equitable doctrine relating to the engagements between husband and wife previous to their marriage, viz. *Darcy v. Chute*.<sup>f</sup> There, Lady Darcy, being a widow, and having a jointure of 700*l.* *per ann.* on a treaty of marriage with Mr. Chute, it was stipulated by deed between them that it should be lawful for her, during the coverture, to receive and dispose of the rents of her jointure as she pleased. They afterwards married, and upon his death she filed a bill against the executor of her husband, for an account of a certain sum of money, part of her jointure charged to be resting in his hands unaccounted for, and relied on the deed between her and husband as her title to the account. But, on the hearing of the cause, the Court declared the aforesaid agreement before marriage with the plaintiff herself, was immediately, by the marriage, extinguished, and would not relieve the plaintiff thereon. This decision, however, does not seem to be now law. Lord Kenyon, speaking of it, says, "But it must not be forgotten that that case was determined by Lord Chancellor Clarendon, who, after an absence of many years was then recently returned to this country, and had not been for some time in habits of business. But, at this time, it cannot be doubted but that a court of equity would enforce such an engagement."<sup>g</sup>

In *Ewbank v. Hollowell*,<sup>h</sup> where a bill was filed by the plaintiff and his wife for a legacy left to the wife by her

<sup>e</sup> 2 Vern. 480.

<sup>f</sup> 2 Cas. in Chan. 21.

<sup>g</sup> Ld. Kenyon's judgment in *Milbourn v. Ewart*, 5 T. R. 384.

<sup>h</sup> 2 Br. C. C. 220.

former husband, by a will made before their marriage, Lord Thurlow decreed the legacy to be paid, although it was objected, that the subsequent marriage between the testator and the legatee was a revocation of the legacy. It does not appear on what ground this decree was pronounced, whether because the will had been made in contemplation of the marriage, and the legacy was intended as a provision for the wife, if she should survive ; or on the ground that the marriage of a testator with his legatee was not a revocation of the legacy.

## BOOK II.

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### CHAPTER. I.

#### OF THE HUSBAND'S INTEREST IN, AND POWER OVER, THE WIFE'S ESTATE OF INHERITANCE, DURING THE COVERTURE.

THE interests which marriage confers on the husband in the personal property of his wife have been the subject of a former part of this work; it remains to describe his interest in her real estate, and the power he acquires over it. And, first, as to these rights during the period of the joint lives of husband and wife.

Husband's interest in wife's inheritance during their joint lives.

The husband gains an estate of freehold in the inheritance of his wife, in her right during her life.<sup>a</sup> He is not, however, solely seised, but jointly with her. The interest which the husband acquires by marriage, in the estate of inheritance of his wife, is most correctly expressed in the technical phraseology of the common law pleaders, viz. "That husband and wife are jointly seised in right of the wife."<sup>b</sup> If the husband pleads, that he *alone* is seised in his demesne as of freehold or as of fee, in right of his wife, it will be had on special demurrer.<sup>c</sup>

Husband and wife jointly seised of wife's inheritance in her right.

But although the husband is said to be jointly seised with his wife, and not solely, in her right, it is not to be inferred that he is incapable of creating an estate of freehold in her inheritance, without her being a party to the conveyance.

Husband may alone create an estate of freehold in wife's in-

<sup>a</sup> Co. Lit 351 a.

<sup>c</sup> 1 Wms. Saund. 253. Doug. 329.

<sup>b</sup> 1 Wms. Saund. 253. Doug. 329. 2 Lut. 596. 2 Wms. Saund. 283.

<sup>2</sup> Lut. 596. 2 Wms. Saund. 283.

heritance,  
and make  
a good te-  
nant to the  
*præcipe*.

For instance, he may alone, during the coverture, create by deed an estate of freehold, and thereby make a good tenant to the *præcipe* without the wife's joining him in a fine.<sup>d</sup> So at the common law, a husband seised in right of his wife might have made a discontinuance of the wife's estate, and thus barred her right of entry ;" which proves that he had the power of conveying the freehold without her consent during his life. For a discontinuance can be worked only by a person having a lawful estate, to which he can give an unimpeachable title during his life ; and he must, consequently, have had a *sole* seisin in the freehold for his life. But this power of the husband to bar his wife's right of entry by a discontinuance, and to put her to her action, has been taken away, since Littleton wrote, by the 32 Hen. 8. cap. 28. sec. 6. By this statute it is enacted, "that no fine, feoffment, or other act thereafter to be made, suffered, or done by the husband only of any manors, &c. being the inheritance or freehold of his wife during the coverture, shall in any wise be or make a discontinuance thereof, or be prejudicial to the wife or her heirs, or to such as shall have right, title, or interest to the same by the death of such wife, but that the wife or her heirs, and such other to whom such right shall appertain after her death, may enter into such manors, &c. according to their rights and titles therein, any such fine, feoffment, or other act of the husband to the contrary notwithstanding, fines levied by the husband and wife, whereunto the wife is party and privy, only excepted." But, as well since this statute as before, the husband may alone convey away the wife's freehold for the period of his own life, the statute making no difference in the extent of his power, but merely as to her remedy.

By 32 H. 8.  
c. 28. s. 6.  
husband  
rendered  
incapable  
of discon-  
tinuing  
wife's in-  
heritance.

Feoffment  
by hus-  
band and  
wife with-  
in the

It has been held, that though this statute speaks of conveyances by the husband only, yet, even if the wife should join him in the conveyance, it is within the act, unless it be

<sup>d</sup> 2 Cruise on Fines, 58. Pigot c Co. Lit. 326 a.  
on Fines, 72. 2 Roll. Ab. 2 Wms.  
Saund, 43 b.



by fine. As where a feoffment has been made by both, still she may enter after his death, as this would be considered in substance as the act of the husband only.<sup>f</sup> So, although the statute refers expressly to estates of inheritance or freehold of the wife only, still it has been held, that where husband and wife are jointly seised to them and their heirs of an estate made during the coverture, and the husband makes a feoffment in fee, and dieth, the wife may enter within that statute, although it was the inheritance of them both.<sup>g</sup>

meaning of  
the 32 H.8.  
c. 28. s. 6.

The statute, also, in terms, gives a right of entry to the wife, and her heirs only, yet it has been held that her issue, and reversioners, and remainderman are equally within its purview. For if lands be given to the husband and wife, and to the heirs of their two bodies, and the husband maketh a feoffment in fee, and dieth, not only the wife is aided by this statute, but also the issue of both their bodies.<sup>h</sup> So where feme tenant in tail taketh husband, the husband maketh a feoffment in fee, the wife before entry dieth without issue, he in the reversion or remainder may enter.<sup>i</sup> The following reasons for which Lord Coke gives: "For, first, the reversion or remainder cannot be discontinued in this case, because the estate tail is not discontinued. Secondly, the words of the statute be, 'shall not be prejudicial or hurtful to the wife or her heirs, or such as shall have right, title, or interest by the death of such wife, but that the same wife and her heirs, and such other to whom such right shall appertain after her decease, shall or lawfully may enter into all such manors, lands, &c., according to their rights and titles therein;' by which words the entry of him in the reversion or remainder is preserved." So if husband, tenant in tail, remainder to the wife in tail make a feoffment in fee, by this the husband, by the common law, did not only discontinue his own estate tail, but his wife's remainder; but at this day, after the

Not only  
the wife  
and her  
heirs have  
a right of  
entry with-  
in the  
above act,  
but her is-  
sue and  
reversion-  
ers and re-  
mainder-  
man.

<sup>f</sup> Co. Lit. 326 a.

<sup>h</sup> Co. Lit. 326 b.

<sup>g</sup> Co. Lit. 326 a. Greenly's case,  
8 Rep. 72 a.

<sup>i</sup> Ibid.

death of the husband without issue, the wife may enter, by the 32 Hen. 8. And if the husband have issue, and maketh a feoffment in fee of his wife's land, and the wife dieth, the heirs of the wife shall not enter during the husband's life, neither by common law nor by the statute.<sup>j</sup>

Wife *de facto* protected by the statute as well as the wife *de jure*.

This statute protects not-only the wife *de jure* from the alienation of her estate by her husband, but also the wife *de facto*. For, if the husband make a feoffment in fee of the lands which he holds in the right of his wife, and after they are divorced *causa præcontractus*, yet the woman may enter within the purview of that statute, and is not driven to her writ of *cui ante divortium*, as she was at the common law, although the entry be given by the statute to the wife, and now it appears that she never was his lawful wife. But Lord Coke says, "it sufficeth that she was his wife *de facto* at the time of the alienation, and where her husband dieth she cannot be his wife at the time of the entry."<sup>k</sup>

Husband may jointly with his wife, levy a fine of her lands which will bar her and her heirs.

So the same statute expressly excepts from its operation fines levied by the husband and wife. whereunto the wife is party and privy. And, accordingly, if such a fine be levied, it will operate as a bar to the wife and her heirs of all her estate and interest in the land. In Beckwith's case,<sup>l</sup> it was resolved, first, that if husband and wife levy a fine of the land whereof they are seised in the right of the wife, and the husband only declare the use of the fine, this declaration of the use shall bind the wife, if her dissent doth not appear, although her assent to the declaration of the uses cannot appear. For when she joins with her husband in the fine, it shall be intended, if the contrary cannot appear, that she joined also with him in agreement in the declaration of the uses of the fine. Secondly, That if husband and wife sell the wife's land to another for money by word, and afterwards levy a fine to the vendee and his heirs, in this case it is good, and shall bind the wife without any writing proving her assent; *à multo fortiori*, when the

<sup>j</sup> Co. Lit. 326 a.

<sup>l</sup> 2 Rep. 57 a.

<sup>k</sup> Co. Lit. 326 a. Greenly's case,  
<sup>8</sup> Rep. 73 a.

use is declared by the husband's deed, and no other declared by the wife, it shall bind.

And although the statute excepts only fines levied by husband and wife, yet a fine levied of the wife's land, even by the husband alone may bar her for ever. As, if the fine be, with proclamations, and the husband die, she must enter or avoid the estate of the conusee within five years, or else she is barred for ever, because the statute 32 Hen. 8 only saves to the wife her right of entry after her husband's death, by preventing a discontinuance; but it does not take away the bar arising from her neglect to enter within five years after the disability of coverture has been removed; for, as Lord Coke observes, the statute speaks of a fine, but not a fine with proclamations.<sup>m</sup>

Fine levied of wife's land by the husband alone, may bar her.

When the husband alone levies a fine of the wife's land, he thereby conveys an estate to the conusee only for his own life, but if the wife join in the fine, and it is afterwards reversed on account of the nonage of the wife, it has been ruled, that the interest of the conusee is at end, and that husband and wife shall have immediate restitution, and the conusee shall not keep the land during the coverture; and the reason given for this judgment was, because when the husband and wife join in a fine, yet all the estate passes from the wife, and the husband joins of necessity and for conformity, and therefore the law doth permit that the truth of it be showed, and that the whole estate shall be restored to the wife during the life of the husband." So if a common recovery be suffered by husband and wife of the wife's lands, this is a bar to the wife, for she ought to be examined upon the recovery. And it is good to bar her as well as a fine, because the *præcipe* in the recovery answers the writ of covenant in the fine, to bring her into court where the examination of the Judges destroys the presumption of law that this was done by the coercion of

Difference between a fine levied of wife's land by husband alone, and by husband and wife.

<sup>m</sup> Co. Lit. 326 a. Greenly's case, 8 Rep. 72.

<sup>n</sup> 2 Rep. 77 b.

the husband, for then it is to be presumed they would have refused her.<sup>o</sup>

Wife not  
barred by a  
fraudulent  
recovery of  
her lands.

But although a common recovery of the wife's lands to which she is a party will bar her, yet if the husband cause a *procipe quod reddat* to be brought on a pretended title against him and his wife, and suffers a recovery without any voucher, and execution to be had against him, she will be protected by this statute, for the recovery will be considered as the act of the husband, and the words of the statute are "made, suffered, or done."<sup>p</sup>

Of leases  
by the hus-  
band and  
wife, of  
wife's  
lands.

And the husband may not only alienate the inheritance of which he is seised in right of his wife by fine, and by a common recovery, where she joins as a party to them, but he may also make a lease of it for term of years or for life, where she joins in the lease, and when the other provisions of the 38 Hen. 8. c. 28. are complied with. This statute enacts, "That all leases to be made of any lands, tenements, or other hereditaments, by writing indented, under seal, for term of years or for term of life, by any person or persons being of full age of twenty one years, having an estate of inheritance, either in fee simple or in fee tail, in their own right or in right of their wives, or jointly with their wives, of an estate of inheritance made before the coverture, or after, shall be good and effectual in the law against the lessors, their wives and heirs, and every of them." The statute then proceeds to provide, that, "First, the old lease must be expired, surrendered, or ended within one year next after the making of the new lease. Secondly, the lands leased must have been most commonly let to farm, or occupied by tenants by the space of twenty years next before the lease made. Thirdly, the lease must be in possession and not in reversion. Fourthly, the lease must not be made for a period exceeding twenty-one years or three lives. (1) Fifthly, the lease must not be made with-

(1) The Irish act of the 10 Car. 1. c. 6. gives a power of leasing for forty-one years.

out impeachment of waste. Sixthly, the lease must reserve a rent amounting to as much or more than had been accustomedly paid within twenty years next before the making of it. Seventhly, the wife must be a party to such lease, which must be by indenture in the names of husband and wife, and sealed by the wife. Eighthly, the rent must be reserved to the husband and wife, and to the heirs of the wife, according to her estate of inheritance in the lands: that he shall not aliene the rent or any part of it for a longer period than during the coverture, without it be by fine levied by the husband and wife, but that the same shall descend or revert after his death unto such persons and their heirs in such manner as the lands so leased should have done if no such lease had been made."

It is to be observed, that this statute, so far as it concerns leases of the wife's lands, relates only to leases, where the rent reserved would belong to the heirs of the wife alone, and not to the heirs of husband and wife. As, where the husband purchased land to him and his wife and their heirs, and afterwards he, without his wife, lets this land for sixty years, *if they should so long live*, rendering 20*l.* per annum during the term; then the husband dies, and if this should bind the wife by the 32 Hen. 8. was the question. And it was held by three justices that it should; because, by the words of the statute, the wife is appointed to join only, when she hath the sole inheritance by the appointment of the rent, to be reserved to the heirs of the wife, and not when she hath a joint estate, as in this case; and then clearly, by the body of the act, the lease by the husband solely is good, and the proviso does not extend to it. However, Lord Hobart, one of the Judges, doubted, and after a special verdict, the matter ended by arbitration.<sup>q</sup> It is a curious fact, that in this case no observation was made by the Court or the counsel on the words, *if they should so long live*," which, if actually in the lease, it must have terminated with the life of the husband.

<sup>q</sup> Smith v. Trinder, Cro. Car. 22. 3 Bac. Ab. 310.

As the decisions which have been had on the above statute apply as well in most instances to leases made by ecclesiastical persons, and to the ordinary leasing powers granted to persons not coming within the meaning of the statute, as to leases by husband and wife, it is not deemed necessary to detail the various cases which have arisen on this subject. It is thought to be sufficient to refer the reader to these authorities generally, as the learning to be found in them does not belong exclusively to a treatise professing to confine itself solely to the doctrines to which the relation of husband and wife has given rise.

Lease void under the statute, may be valid at the common law.

However, although a lease of the wife's inheritance, not containing the qualifications required by the statute of the 32 Hen. 8. c. 28., would be defective under that act, still it may be valid to a certain extent at the common law. For if the husband and wife, or the husband alone, either before or since the statute, make such a lease of her lands, it would be good and unavoidable during the coverture. But upon the termination of the coverture by the husband's death, if it were not actually void, it would then depend on the will of the wife, whether this lease should be avoided or not. If she dissent from the lease before any act done by her after her husband's death to affirm it, it becomes void.

Lease by husband and wife, though not conformable to the statute, good at common law.

And, first, where the lease has been made by husband and wife of the wife's estate, though not made in conformity with the statute, it is a good lease of both during the coverture, and may be pleaded as their lease.<sup>a</sup> But if she disagree to the lease after her husband's death, it will be void as to the wife *ab initio*, and she may plead *non dimiserunt*.<sup>b</sup> And by this subsequent disagreement, and by relation and operation of law, it is the lease of the husband only.<sup>c</sup> For the joining of the wife in such a lease gives no additional validity to it; she, being under coverture at the time, and not *sui juris*, is still at liberty to

<sup>r</sup> See Mr. Sugden's Treatise on Powers.

<sup>s</sup> 2 Rep. 61 b.

<sup>t</sup> 3 Rep. 28 a. 1 Leon. 192.  
<sup>u</sup> Ibid.

express her dissent, and thereby to defeat the lessee's interest altogether.

And though husband and wife make a lease for years of the wife's land without any reservation of rent, yet this has been held to be a good lease by them both during the coverture, and that the wife, after the husband's death, may affirm the same, for as the husband made such lease at first, without any reservation of rent, so the wife, if she thinks fit, may continue the lessee in possession after her husband's death upon the same terms.<sup>v</sup>

Lease by husband and wife without reservation of rent, voidable only.

But though the wife may avoid a lease made by herself and her husband of her lands after his death, yet if she dies without having done any act, either confirming or avoiding it, the person claiming paramount to her cannot avoid it. As, where A. and B. joint-tenants for their lives, A. takes C. to husband, and husband and wife by indenture lease their moiety for twenty-one years, reserving rent; then the wife dies, and B., the surviving joint-tenant, would have avoided this lease, as the wife might have done, if she had survived her husband; but it was adjudged, that the lease being only avoidable and not void, *quoad* the wife, by her death this power of avoiding it is gone, and cannot be transferred to the surviving joint-tenant, who claims, not under her, but paramount to her, and then the lease is become unavoidable during the life of the other joint-tenant; for the lease being good at first, the wife's disagreement to make it void was more necessary than her agreement was to make it good.<sup>w</sup>

Nor can the wife herself, after her husband's death avoid a lease made by them, if she takes a second husband who accepts the rent.<sup>x</sup>

Also, if the husband alone make a lease of his wife's land, it will be good during the coverture; but it seems to be questionable whether such a lease would not be void after

Lease by husband alone of his wife's land, good during the coverture.

<sup>v</sup> Jackson v. Mordant, Cro. Eliz. 112. 3 Bac. Ab. 307.

<sup>w</sup> 3 Bac. Ab. 208. Smalman v. Agburngh, Cro. Jac. 417.

<sup>x</sup> 3 Bac. Ab. 308. Dyer, 159.

the death of the husband, and incapable of being confirmed by the wife's acceptance of the rent. Indeed, Bacon in his Abridgment, says, "If husband seised of lands in right of his wife makes a lease thereof for years by indenture or deed poll reserving rent, *all* the books agree this to be a good lease for the whole term, unless the wife, by some act after her husband's death, shows her dissent thereto; for if she accepts rent, which becomes due after his death, the lease is thereby become absolute and unavoidable."<sup>y</sup> However, Serjeant Williams, in his note to *Wotton v. Hele*,<sup>z</sup> shows that *ALL* the books do not agree in the above position, for that some of these cited by Bacon do not prove the position, and that others of them actually disprove it. For instance, in Bro. Acceptance, 10. the position is, that if a lease be made by husband *and wife* of the wife's lands rendering rent, and the wife accepts rent after her husband's death, she has made the lease good. And in Co. Lit. 45 b. it is said, that a man seised in right of his wife, *together with his wife*, may by deed indented make leases agreeable to the statute 32 Hen. 8., all of which were voidable at the common law. These are authorities to show that leases by husband *and wife* are not void, and may be confirmed by her after his death; but they do not prove that leases by the husband alone may be rendered valid by her acceptance of rent. In Bro. Leases, 24, which Bacon cites in favour of his proposition, it is laid down, that if a husband seised in right of his wife, leases her lands for *years*, and dies within the term, the lease by his death is void, which directly disproves the position it is cited to support. The remaining cases cited by Bacon in support of his position, are *Browning v. Beston*,<sup>a</sup> and *Jordan v. Wikes*,<sup>b</sup> in the first of which, counsel, in his argument, says, that if a man makes a lease for years of his wife's land and dies, the lease is not void before entry made by the wife; and the second case,

<sup>y</sup> 1 Bac. Ab. 302.  
<sup>z</sup> 2 Saund. 180 b,

<sup>a</sup> Plow. 137.  
<sup>b</sup> Cro. Jac. 332.



where the husband made a lease of his wife's lands for five years in an ejectment for trial of the title, and died before the action was brought, and it was adjudged, that inasmuch as the wife had not entered after her husband's death, the lease was not determined or rendered void by that event, but voidable only. Such are the cases cited in Bacon, to prove that a lease by husband alone of his wife's lands is not void after his death, but may be affirmed by her acceptance of rent. However, Serjeant Williams has cited two authorities to show that such a lease would be void and that she would not be bound by the acceptance of rent ; first, in Bro. *cui in vita*, 1. Acceptance, 1. S. C., that if a lease be made by the husband only, and he dies, and the wife accepts rent, the acceptance does not bind, for she was not privy.

So in Bro. Acceptance, 6. it is observed, that if husband and wife join in a lease of the wife's land, rendering rent, and the husband dies, and the wife accepts rent, she is bound ; but it is otherwise where the husband *alone* makes a gift or lease reserving rent, and dies, and the wife accepts rent ; this will not bind her : note a diversity *quod nullus contradixit*. So in Bro. Barre 27., it is said, "that if the husband alone leases for *life* and dies, the wife cannot bring an action of waste, because she is not privy to the lease ; and hence it follows that the wife, by acceptance of the rent, where she was not a party to the lease, shall not be bound, if it was a lease for *years*, but may enter ; but if it be a lease for life, she is put to her *cui in vita*." So that the difference as to the effect of the wife's acceptance of rent, where the husband has made a lease for life, and where for years, is, that in the former case she is put to her action, and in the latter she may enter, but in neither case is the lease affirmed by the acceptance of the rent. Serjeant Williams suggests, that all these cases may be reconciled by distinguishing between leases for *life* and years ; that in the former case, as the estate commenced by livery, it can only be avoided by entry ; but that in the latter the lease is absolutely void, and determined by his death.

Lease by husband alone of wife's land void, and wife not bound by acceptance of rent after his death.

Difference  
between  
leases by  
husband  
and wife,  
when by  
deed and  
when by  
parol.

However, a distinction must be observed between leases by husband and wife of the wife's inheritance, when they are by deed and when by parol; for if they be by deed, though not made pursuant to the statute, still they are voidable only, and may be affirmed after the husband's death;<sup>c</sup> but if they be by parol, they are void, and determine absolutely by the husband's death, and cannot be affirmed.<sup>d</sup> And the reason given in the books for this difference is, that the wife's assent ought to appear to be given at the time when the lease was made, which, without some deed or instrument in writing, it cannot do; and accordingly it is stated in *Dyer* to have been the opinion of all the judges of that day, that if husband and wife make a lease for years before the statute 32 Hen 8. c. 28. by parol reserving rent to them, and then the wife, after the husband's death accepts the rent, this will not prevent her from avoiding the lease, if it were not by indenture; because her assent is requisite to the commencement of the lease, and this can be done only by deed. And the same point was ruled in *Walsal v. Heath*.<sup>e</sup> Bacon, in his Abridgment, title *Leases*,<sup>f</sup> says, "This seems a very indifferent reason, when in the case of a lease for years by the husband solely by deed her assent appears not at all, but rather the contrary, and yet she may affirm such lease (2), if she thinks fit, after his death, as well as as if she had joined therein; therefore, a better reason for this distinction seems to be, that the inheritance and right of the estate continuing still in the wife, notwithstanding the intermarriage, if the husband does nothing to discontinue or divest that estate, all charges of his thereout fall off with his death, which determines his power and interest over the estate;

(2) This reasoning is grounded on the supposition that a lease by the husband *alone* of the wife's inheritance was voidable only, and not absolutely void on the death of the husband: sed vide supra, pp. 170, 171, and Serjeant Williams's note (g), to 2 Saund. 180 b.

<sup>c</sup> 1 Rolle Ab. 349. *Greenwood v. Pyber*, Cro. Jac. 563.  
<sup>d</sup> *Dyer*, 91 b. 146. b.

<sup>e</sup> *Ibid.*  
<sup>f</sup> Cro. Eliz. 656.  
<sup>g</sup> 3 Bac. Ab. 306.

but a lease for years being an immediate contract for or disposition of the land itself, if the same appears in writing duly executed, so that there can be no variation or deviation therefrom attempted by the lessee after the husband's death, the law so far gives countenance to such lease for the encouragement of farmers and husbandmen, that the same shall continue in force till the wife's actual dissent or disagreement thereto, but because there can be no such certainty of the terms of a parol lease, where nothing appears in writing to manifest them, therefore they, like other charges of the husband, fall off, and drop with his estate or interest therein." (3)

The next consideration is by whom voidable leases, made by husband and wife of her inheritance, may be confirmed or avoided. The husband is always bound by a lease executed by him of his wife's lands, but the wife, whether she have joined in it or not, (unless it be pursuant to the 32 Hen. 8. c. 28,) is not bound by it, for having been a married woman at the time of the execution of it, she was incapable of contracting, and is therefore at liberty, when the disability is removed, to avoid or affirm this contract, if it be capable of confirmation.

Wife may confirm or avoid voidable leases.

The same power of affirming or avoiding such leases descends upon the issue,<sup>h</sup> or heir<sup>i</sup> of the wife. So a subsequent husband may avoid or affirm a voidable lease made by the wife and a former husband. As where husband and wife made a lease for years, by indenture, of the wife's land, reserving rent. The lessee enters, the husband before any day of payment, dies. The wife takes a second husband, and he, at the day, accepts the rent, and dies. And it was held, that the wife could not now avoid the lease, for by her second marriage she transferred her power of avoiding it to her husband, and his acceptance of the rent binds her, as her own before such marriage would

Heir and issue of wife may confirm or avoid. Subsequent husband may confirm or avoid voidable lease made by prior husband and wife, of her lands.

(3) By the statute of frauds, no parol lease is good for a longer period than three years.

<sup>h</sup> Jeffery v. Guy, Yelv. 78.

<sup>i</sup> Vaughan, 46.

have done : for he, by the marriage, succeeded into the power and place of his wife ; and what she might have done, either as to affirming or avoiding such lease before marriage, the same the husband may do after the marriage.<sup>k</sup>

Conusee of fine levied by husband and wife, may avoid void lease made of her lands before the fine.

A void lease also may be avoided, not only by the wife herself after her husband's death, and by any after-taken husband, and by her heir or issue ; but the conusee of a fine levied by husband and wife of the lands after the void lease has been made, may avoid it. As where a man seised of lands in right of his wife, makes a lease for years thereof by parol, and then he and his wife levy a fine to a stranger, and die, it was adjudged, that the conusee of the fine should avoid this lease, for being made by parol only, it was absolutely void as to the wife ; so that no acceptance or act of hers after his death could make it good, and then the conusee, who came in wholly by the wife, shall take advantages thereof, as the wife herself should have done : for the husband's joining in the fine was only for conformity, for the whole estate and inheritance passed from the wife, and nothing from the husband ; and of void acts, and when they begin to be so, strangers may have the benefit.<sup>l</sup> But where the husband and wife made a lease for ninety-nine years of the wife's lands, and after joined in levying a fine of the reversion to a stranger, Bacon, in his *Abridgment*,<sup>m</sup> states it to be the better opinion, "that the counsee of the fine should hold subject to this lease : for being by indenture, it was not absolutely void, but only voidable by the wife after her husband's death ; and then when she joins in a fine of the reversion before her time of election for avoidance thereof comes, this destroys her own power of election, because now she has nothing more to do with the estate ; and it cannot transfer a like power of election to the conusee, because that was a thing merely in action, and peculiar to the wife, in regard to her cover-

<sup>k</sup> Dyer, 159. Roll Ab. 475.  
 Rol. Rep. 172.

<sup>l</sup> 3 Bac. Ab. 307. Harvey v.  
 Thomas, Cro. Eliz 216.  
<sup>m</sup> 3 Bac. Ab. 308.

ture, and, consequently, the lease is become absolute, and the conusee shall hold subject thereto."

Such are the persons who may confirm or avoid the leases of the wife's lands made by husband, or by husband and wife. The acts by which leases merely voidable may be confirmed, are, acceptance of rent,<sup>n</sup> or any proceeding for the recovery of it, as an action of covenant for it, an avowry for it, ejectment for non-payment of it. So if there be no rent reserved, the acceptance of fealty<sup>o</sup> will confirm it. An action against the lessee for waste will also operate as a confirmation.<sup>p</sup>

It has been decided, however, that if the lease by husband and wife of her lands be executed merely as a security for money, that her payment of interest after her husband's death, will not confirm the lease, as where the husband and wife seised in right of the wife of a share of the new river water, made a mortgage by way of lease for one thousand years, by deed without fine, reserving a peppercorn rent; husband died, on which the wife received the profits and paid the interest; and now the mortgagee filed his bill of foreclosure, insisting that the lease, not being void, but only voidable by the feme after her husband's death, and she having, when discoverd, paid the interest, the same amounted to an election in her to affirm the lease; but the Master of the Rolls said, in this case there ought to have been a fine, it being the inheritance of the wife if there had been a rent reserved, the acceptance of such rent by the wife, when discoverd, would have affirmed the lease; but here is no acceptance, and the lease is of an incorporeal thing, out of which rent could not well be reserved: wherefore, the lease expiring by the death of the husband, the mortgage is also thereby determined, and nothing remaining to foreclose. The bill was accordingly dismissed, but without costs.<sup>q</sup> But if the wife had re-delivered the deed after the

Acts by which leases may be confirmed.

Lease may be confirmed by acceptance of rent.

By any proceeding for the recovery of it.

Lease by husband and wife, by way of mortgage, not confirmed by payment of interest by wife.

<sup>n</sup> Doe on the demise of Collins v. Weller. 7 T. Rep. 478.  
<sup>o</sup> 3 Bac. Ab. 307.  
<sup>p</sup> Ibid.

<sup>q</sup> Drybutter v. Bartholomew, 2 P. Wms. 127. See Mr. Roper's observations on this case in his 1st vol. 137.

When husband and wife make a voidable lease of her lands, a re-delivery of the deed by her after husband's death is a confirmation.

death of her husband, or had done acts amounting to a re-delivery, that would have amounted to a confirmation of it. As in *Carter v. Strapham*,<sup>r</sup> where husband and wife seised in her right demised by way of mortgage for ninety-nine years the inheritance of the wife. After the death of the husband, the wife surrendered to the executors of the mortgagee the house which was part of the mortgaged premises, and desired the tenants to attorn to the executors and pay their rent to them. An ejectment on the title was afterwards brought by the widow for a house in London, part of the mortgaged premises, on the ground that the deed of a married woman was void. The jury found for the defendants, considering the facts proved amounted to a sufficient confirmation by the wife; and the Court above concurred with the jury. Lord Mansfield, proving by authority, that where a first delivery is void, as in case of a married woman, the second, after her husband's death, is good and effectual; and that a delivery need not be in any precise form of words, but that there may be circumstances which will be equivalent to a delivery.<sup>t</sup>

Acts by which voidable leases may be avoided.

The acts by which voidable leases may be avoided, where no act has been done to confirm them, are, entry, ejectment on the title, trespass, or any other proceeding denying the right of the lessee. So, if an action be brought against the wife or any person claiming under her, where there has been no confirmation of it, upon any of the covenants in the lease, *non demisit* may be pleaded,<sup>u</sup> which would seem to be a complete avoidance of the deed.

Leases of wife's inheritance voidable by the wife, are good against the husband.

But though such leases may be avoided by the wife if she survive her husband, yet, if he survive, he cannot avoid them, because they are valid leases to the extent of his interest in the lands, and are binding on him: he has an interest in the rents and profits of the wife's estate so long as they both live; and, therefore, so long his lease of them will be good. He may also have an interest in them during his own life, as tenant by the curtesy, and his lease may

<sup>r</sup> Cowper, 201.  
<sup>s</sup> Perk. Sec. 154.

<sup>t</sup> Co. Lit. 36 a.  
<sup>u</sup> 3 Bac. Ab. 306.

be so long valid ; but even though he should not be tenant by the curtesy, his lease made during the marriage will continue to be good after his wife's death, against the lessee and all those claiming under him, until the persons entitled to the inheritance make an entry : as, where a woman, tenant in tail, having issue by a former husband, after his death, married a second husband, and they by indenture, joined in a lease for years of the wife's lands, rendering rent, and then the wife died without issue by the second husband ; so that he was not entitled to be tenant by the curtesy ; yet it was held, that till the issue by the first husband entered, this lease remained good, and therefore, the husband there recovered in an action of covenant against the lessee upon issue found for him, that there was no entry made by the wife's issue, because till then the lease was still subsisting, and consequently the lessee bound by his covenants in such lease.<sup>v</sup> In like manner, where a man seised of land in right of his wife makes a lease for years, rendering rent, and then his wife dies without having had issue by him, whereby he is not tenant by the curtesy, but his estate determined, yet he may avow for the rent till the heir hath made his actual entry, because the lease was at first good, and drawn out of the seisin of the wife ; and, therefore, till the entry of the heir, remains good between the lessor and lessee, so that the lessee may maintain an action of covenant, and the lessor distrain and avow for the rent, till the heir hath entered.<sup>w</sup>

Although the wife has no power during the coverture by herself to alienate or charge her estate so as to destroy her husband's interest therein, yet she may bar herself and her heirs of their interest in her inheritance by a fine levied solely by herself without her husband, if he do not enter and avoid the estate of the conusee, because she was examined, and has the power of the land.<sup>x</sup>

Wife may bar her own interest in her inheritance by a fine levied solely by herself.

<sup>v</sup> Yelv. 78. Jeffery v. Guy, 3 Bac. Ab. 309.

<sup>w</sup> Vaughan, 46. 3 Bac. Ab. 309.

<sup>x</sup> Mary Portington's case, 10 Rep. 43 a.

Husband may enter and defeat fine levied by his wife of her estate during coverture.

The wife and her heirs are estopped by this fine, to claim any thing in the land, and cannot be admitted to say she was covert against the record,<sup>y</sup> but the husband may enter and defeat it, either during the coverture, to restore him to the freehold he held *jure uxoris*, or after her death to restore himself to his tenancy by the curtesy, because no act of a *feme covert* can transfer that interest which the intermarriage has vested in the husband. But if the husband avoids the fine during the coverture, the wife and her heirs shall never after be bound by it.<sup>z</sup>

Wife barred by a common recovery suffered by her alone during coverture.  
*Sed qu.*

It is also said, that if the wife alone suffer a common recovery of her own land, it will be a bar, until it has been avoided, but Rolle in his Abridgment expresses a doubt respecting it.<sup>a</sup>

Husband and wife barred of all interest in her lands by her attainder for felony, before the birth of issue.

And the wife may not only defeat her own and her husband's interest in her estate of inheritance by these acts, which he may afterwards avoid, but also she may put an end to such estate by an act, for which he can have no remedy. As if she be attainted of felony before the birth of issue capable of inheriting the estate, the lord by escheat may enter and put out the husband. But if the felony be committed after such issue has been born, the lord may not put out the husband, for then he has completed his title to an estate for life.<sup>b</sup> On the birth of the issue the husband becomes tenant to the lord, and therefore his interest cannot be defeated by escheat for the felony of his wife.

Husband does not affect wife's interest in her lands by his attainder.

But, though the wife may destroy her own and her husband's interest in her estate of inheritance by her attainder of felony, yet if the husband be attainted of felony, he does not thereby affect her interests; he merely forfeits his own; for by his felony the king gaineth no freehold, but a pernancy of the profits during the coverture, and the freehold remaineth in the wife.<sup>c</sup>

y Hob. 225. 7 Cok. Rep. 8.  
z Co. Lit. 46 a.  
a 1 Rol. Ab. 347. 2 Com. Dig. 97.

b Co. Lit. 351 a.  
c Ibid.



The husband may, however, forfeit not only his own, but his wife's interest in her estate of inheritance by his neglect; as if a feme be enfeoffed either before or after marriage, reserving a rent, and for default of payment, a re-entry, in that case the laches of the baron shall dis-herit the wife for ever.<sup>d</sup> In like manner, if a woman has a right to land, and takes husband, the laches of the husband to make claim binds the wife. As if tenant for life, remainder to a woman, levy a fine, and the woman takes husband, who does not enter within five years after levying the fine, the wife shall be bound by the fine and non-claim.<sup>e</sup>

Wife's interest in her estate of inheritance, forfeited by laches of husband.

<sup>d</sup> Co. Lit. 246 b.

<sup>e</sup> Dyer, 159 a.

## CHAPTER II.

OF THE HUSBAND'S INTEREST IN HIS WIFE'S ESTATE OF INHERITANCE AFTER HER DECEASE, VIZ. TENANCY BY THE CURTESY, ITS NATURE, INCIDENTS, AND THE MODES BY WHICH IT MAY BE BARRED.

Tenancy  
by the  
curtesy.

THE first chapter of this book has described the interest which the husband acquires by marriage in his wife's estate of inheritance *during the coverture*; his interest, however, does not always terminate with her life, but may be extended beyond this period; for if he survive her he may have entitled himself to the continued enjoyment of her inheritance for his own life, although there have been no contract to this effect; and this new estate is termed a tenancy by the curtesy. 'Tenant by the curtesy of England is, where a man marries a woman seised of an estate of inheritance, that is, of lands or tenements in fee simple, or fee tail, and has by her issue, born alive, which was capable of inheriting her estate, and the woman afterwards dies in his lifetime. In this case he shall hold the lands during his life, as tenant by the curtesy of England.' This estate, though called a tenancy by the curtesy of England, is not peculiar to this country, for the benefit of it is extended as well to Ireland and Scotland.<sup>b</sup>

Seisin of  
the wife  
must be in  
deed, and  
not in law  
only.

There are four preliminary events requisite to the completion of this title, viz marriage, seisin, issue, and death. The marriage which would be a necessary qualification to the constitution of this estate, must be valid. With respect to the second event, viz. seisin, it is an ingredient essential to the completion of this title, that the wife should have

been actually seised, that is, in deed, and not merely in law. As, if a man die seised of lands in fee simple, or fee tail general, and these lands descend to his daughter, and she takes a husband and has issue, and dies before any entry, the husband shall not be tenant by the curtesy, and yet in this case she had a seisin in law; but if she or her husband had during her life entered, he should have been tenant by the curtesy.<sup>c</sup> And the reason given by Lord Coke, that a man shall not be tenant by the curtesy of a seisin in law, is, that any issue of the wife would not be capable of inheriting the estate from *her*, but must make himself heir to the person last *actually* seised.<sup>d</sup> However, a seisin in deed by the wife is necessary only, when, as Lord Coke expressed it, "it may be attained unto;"<sup>e</sup> if an actual seisin be impracticable, then the want of it shall not bar the husband's right to this tenancy. As where a man seised of an advowson, or rent in fee, has issue a daughter, who is married, and has issue, and he dies seised. The daughter, before the rent became due, or the church became void, also dies; the husband shall be tenant by the curtesy, though his wife had but a seisin in law.<sup>f</sup> And the reason given by Lord Coke for such a seisin being sufficient under these circumstances is, because the husband could by no industry attain to any other seisin.<sup>g</sup> *Et impotentia excusat legem.* However, Perkins<sup>h</sup> says, the husband shall have curtesy in an advowson, though he suffers the ordinary to present by lapse on an avoidance in his wife's lifetime; a position at variance with Lord Coke's doctrine, that where the husband should by industry have acquired a seisin in deed, and had neglected to do so, he could not be tenant by the curtesy. But, if the wife be tenant in common, the possession of her co-tenant is equivalent to a possession by herself.<sup>i</sup>

Seisin in deed not necessary, if impracticable.

c Co. Lit. 29 a. Co. Lit. 40 a.

d Co. Lit. 40 a. 8 Rep. 36.

e Co. Lit. 29 a. Co. Lit. 40 a.

f Co. Lit. 29 a.

g Co. Lit. 15 b. 29 a.

h Perkins, 468.

i 7 Vin. 150.

However, if a man seised of a manor to which an advowson is appendant, dies, having issue a daughter, who takes husband, has issue, and dies before entry into the manor, it seems that the husband shall not be tenant by the curtesy either of the advowson or of the rents incident to the manor, because he had not seisin of the principal.<sup>j</sup>

Possession of the lessee for years, a sufficient seisin to constitute the husband tenant by the curtesy.

When it is said that a seisin in deed, during the wife's life, is requisite to entitle the husband to a tenancy by the curtesy, it is not to be understood that an actual entry is necessary to constitute such a seisin, for if the land be in lease for years, the husband may be tenant by the curtesy without any entry, or even without receipt of rent, the possession of the lessee for years being deemed the possession of husband and wife. And so it was ruled by Lord Hardwicke in the case of *De Grey v. Richardson*.<sup>k</sup> In this case certain lands, on which there were leases for years existing, and an arrear of rent due, descended on the wife of the defendant, Plampin Richardson, as tenant in tail general. She died three months after the first gale of rent became due, having had issue two children, but never having entered into the possession of the lands, or received any part of the rents. It was contended on this ground, on the part of her eldest son, that his father was not entitled to be tenant by the curtesy. The Chancellor in his judgment relied on a passage in Coke Littleton to prove that the possession of the lessee for years is the possession of husband and wife, because it proved that such a possession, without receipt of rent, was so far an actual seisin of the brother as to make his sister his heir. The passage is this, "If the father maketh a lease for years, and the lessee entereth and dieth, the eldest son dieth during the term before entry or receipt of rent, the youngest son of the half blood shall not inherit, but the sister, because the possession of the lessee for years is the possession of the eldest son, so as he is *actually seised* of the fee simple, and

<sup>j</sup> Hargrave's note, 163., Co. Lit. 29 a.  
<sup>k</sup> 3 Atk. 469.

consequently the sister of the whole blood is to be heir.<sup>1</sup> And his Lordship showed by a subsequent passage of the same author,<sup>m</sup> that the case of tenancy by the curtesy was much more favourably considered than a *possessio fratris*, such as "*facit sororem esse hæredem*;" from which he argued, that if the possession of the lessee would give an *actual seisin* to the eldest son, so as to exclude the younger son of the half blood from the inheritance, and to let it descend to the sister of the whole blood, *à fortiori*, would a similar possession be such a seisin as would entitle a husband to be tenant by the curtesy.

The birth of issue is also necessary to give the husband a right to the tenancy by the curtesy. This issue must be born alive, of which its crying is not an essential proof; for, as Lord Coke observes, "Peradventure it may be born dumb."<sup>n</sup> It must also be of the human species, for if the wife be delivered of a monster, this is no issue in law.<sup>o</sup> But a mere deformity in any part of his body will not bring him within this description, for, if he have a human shape, it will be sufficient.<sup>p</sup> But though it should be born deaf and dumb, or be an idiot, still it is lawful issue to make the husband tenant by the curtesy.<sup>q</sup> The issue must also be born in the lifetime of its mother. If she die before it comes into life, the husband cannot be tenant by the curtesy, for this title ought to commence with the birth of the issue, and be perfected by the death of the wife. But if the wife die before the birth of the child, then the child could not be said to have been born during the marriage, nor in the lifetime of the wife, and therefore the husband could not allege in pleading, as he ought, that he had issue during the marriage.<sup>r</sup>

This issue must not only be born alive in his mother's lifetime, and be of the human species, but it must also be such as is capable of inheriting the wife's estate; for if

Birth of issue.  
Must be born alive;

and of the human species.

Must be born in the lifetime of the mother.

Must be capable of inheriting his mother's estate.

<sup>1</sup> Co. Lit. 15 a.  
<sup>m</sup> Co. Lit. 15. b.  
<sup>n</sup> Co. Lit. 29 b. Paine's case, 8 Rep. 34.

<sup>o</sup> Co. Lit. 29 b. Paine's case, 8 Rep. 34.  
<sup>p</sup> Ibid.  
<sup>q</sup> Ibid.  
<sup>r</sup> Ibid.

If wife be  
attainted of  
felony be-  
fore birth  
of issue,  
husband  
cannot be  
tenant by  
the cur-  
tesy.

lands be given to a woman and the heirs male of her body, she takes a husband and has issue a daughter only and dies, he shall not be tenant by the curtesy, because the daughter by no possibility could inherit the mother's estate in the land.<sup>s</sup> And even though the issue should exactly answer the description of heir to whom the lands were limited, still it may not be capable of inheriting them, and therefore cannot qualify the husband to be tenant by the curtesy. As if the wife seised of lands or tenements in fee be attainted of felony before the birth of issue, although she has issue afterwards, her husband shall not be tenant by the curtesy, because such issue never, was capable of inheriting.<sup>t</sup> But if the issue were born before the attainder of the wife, although such issue never could afterwards inherit to her, such subsequent event rendering him incapable, yet the husband shall be tenant by the curtesy, because the issue when born might by possibility have inherited to her.<sup>u</sup>

Immaterial  
whether  
issue be  
born before  
or after the  
descent of  
the lands.

However, it is immaterial at what period of the coverture the issue capable of inheriting was born, whether it be before or after the descent of the lands upon the mother, or whether at the time of such descent the issue be living or dead. As if a man seised of lands in fee hath issue a daughter, who taketh husband and hath issue, the father dieth, the husband enters, he shall be tenant by the curtesy, albeit the issue was had before the wife was seised.<sup>v</sup> And even if the issue should die in the lifetime of the wife's father, before any descent of the land, still the husband would be tenant by the curtesy.<sup>w</sup> Even if the wife be seised in fee, and be disseised, and then have issue, and the wife die, the husband shall enter and hold by the curtesy.<sup>x</sup>

Husband  
may be te-  
nant by the  
curtesy,  
after the

As the husband may be tenant by the curtesy, though the issue be dead, it follows that he may have this tenancy, after the estate out of which it is derived has been deter-

<sup>s</sup> Co. Lit. 29 b. Paine's case, 8 Rep. 34.

<sup>t</sup> Co. Lit. 40 a.

<sup>u</sup> Ibid.

<sup>v</sup> Co. Lit. 29 b. Paine's case, 8 Rep. 34.

<sup>w</sup> Ibid.

<sup>x</sup> Co. Lit. 30 a.

ained. As where a man takes a wife seised of an estate tail general, and has issue, which issue dies, and the wife dies without any other issue, yet the husband shall be tenant by the curtesy, although the estate tail is determined, because he was entitled to be tenant *per legem Angliæ* before the estate in tail was spent, and for that the land remaineth.<sup>y</sup> For the husband's tenancy is not derived merely out of the estate of the wife, but is created by the law by privilege and benefit of law tacitly annexed to the gift of the estate tail.<sup>z</sup>

determina-  
tion of the  
estate out  
of which it  
is derived.

The birth of issue capable of inheriting the wife's estate is the period at which the tenancy by the curtesy commences. By this event the husband has acquired an inchoate title to this interest, which requires nothing further for its perfection except the death of the wife; even before her death he was stiled tenant by the curtesy initiate, so soon as the child was born, and was considered to be tenant to some extent and for some purposes: for instance, after issue had, he then became tenant to the lord, and was obliged to do homage alone.<sup>a</sup> So if the husband and wife be seised in fee of a seigniorship in the right of his wife, and have not had issue, the husband shall not receive homage alone; but if he have had issue by his wife, then he shall receive homage alone during the life of his wife, because he, by having of issue, is entitled to an estate for term of his own life, in his own right, and yet is seised in fee in the right of his wife; so as he is not a bare tenant for life.<sup>b</sup> After the death of his wife he shall neither receive nor do homage, having then but a bare tenancy for life.<sup>c</sup> In like manner, if after issue born the husband make a feoffment in fee, and the wife dieth, the feoffee shall hold it during the life of the husband, and the heir of the wife shall not during his life recover it in *sur cui in vita*, for it could not be a forfeiture, for that the estate at the time of the feoffment was an estate of tenancy by the curtesy initiate and

Tenant by  
the curte-  
sy initiate,

y Co. Lit. 30.

z 8 Rep. 36, Paine's case.

a Co. Lit. 30 a.

b Co. Lit. 67 a.

c Ibid.

not consummate.<sup>d</sup> So Lord Chief Justice Hale states in his manuscripts that the husband cannot use the title of his wife's dignity before issue born, but afterwards he may.<sup>e</sup>

What estates do not admit of curtesy.

Not bare rights or titles; nor a reversion or remainder expectant on an estate of freehold.

It has been already shown that a man shall have curtesy of an estate in fee simple or fee tail, of which his wife was seised during the marriage; but he cannot have curtesy of a bare right or title, nor of a reversion or remainder, expectant upon any estate of freehold, unless the particular estate be determined or ended during the coverture.<sup>f</sup> It would seem from the above note of Lord Hale, that his Lordship considered a title of honour admitted of curtesy, but Mr. Hargrave shows<sup>g</sup> that doubts have been entertained on this subject, and that no formal judgment has been as yet pronounced upon it. He says, "he cannot learn that there have been any claims of dignities by curtesy since Lord Coke's time; and from the want of modern instances of such claims, and from some late creations, by which women have been made peeresses, in order that the families of their husbands might have titles, and yet the husbands themselves continue commoners, it seems as if the prevailing notion was against titles of honour."

Husband may be tenant by the curtesy of a trust.

In the time of Lord Coke the law was, that there could be no tenancy by the curtesy of an use,<sup>h</sup> that is of an estate of which the wife had not a legal seisin, but now it is settled that such a tenancy may be of a trust as well as of a legal estate. The first case on this point was *Sweetapple v. Bindon*,<sup>i</sup> where W. B. devised 300*l.* to his daughter Mary, to be laid out by her executrix in lands, and settled to the only use of her daughter Mary and her children, and if she died without issue, the lands to be equally divided between her brothers and sisters then living. The plaintiff married the legatee and had issue by her, and she and her child being both dead, and the money not laid out in land, the

<sup>d</sup> Co. Lit. 30 a.

<sup>e</sup> Hargrave's note, 167. Co. Lit. 165.

29 b.

<sup>f</sup> Co. Lit. 29 a.

<sup>g</sup> Note, 167. Co. Lit. 29 b.

<sup>h</sup> Co. Lit. 29 a. Hargrave's note,

<sup>i</sup> 2 Raith. Vern. 536.



husband prayed by his bill that he might have either the money laid out in lands and settled on him for life, as being tenant by the curtesy, or that he might have the interest of the money during his life. It was decreed by the Lord Keeper Wright, that the money was to be considered as land, and the husband was entitled to the interest thereof as tenant by the curtesy, because if it had been an immediate devise of land, the wife would have been tenant in tail, and consequently her husband would have been tenant by the curtesy.<sup>j</sup> However, this decision was afterwards disapproved of by Sir Thomas Clarke in *Burgess v. Wheate*. The doctrine laid down in this case, namely, that a husband is entitled to be tenant by the curtesy of a trust estate, was afterwards relied on in the subsequent cases of *Olway v. Hudson*<sup>k</sup> and *Williams v. Wray*,<sup>l</sup> although the point itself did not arise in them. The next decision on the question was in *Watts v. Ball*,<sup>m</sup> where one seised of lands in fee had two daughters, and devised his lands to trustees in fee, in trust to pay his debts, and to convey the surplus to his daughters equally. The younger daughter married and died, leaving an infant son and her husband surviving. The eldest daughter filed a bill for a partition, and the only question was, whether the husband of the younger should have an estate for life conveyed to him, as tenant by the curtesy. The above case of *Sweetapple v. Bindon* was relied on for the husband, and Lord Chancellor Cowper decreed, "that trust estates were to be governed by the same rules, and were within the same reason, as legal estates; and as the husband should have been tenant by the curtesy had it been a legal estate, so should he be of this trust estate, and if there were not the same rules of property in all courts, all things would be, as it were, at sea, and under the greatest uncertainty." And in *Chaplin v. Chaplin*<sup>n</sup> Lord Chancellor Talbot said "he took it to be

<sup>j</sup> 1 Black. Rep. 138. 1 Eden's C.  
C 197.

<sup>k</sup> 2 Vern. 585.

<sup>l</sup> 2 Vern. 680.

<sup>m</sup> 1 P. Wms. 108.

<sup>n</sup> 3 P. Wms. 234.

settled, that the husband should be tenant by the curtesy of a trust."

Husband may be tenant by the curtesy of an equity of redemption.

It is also settled that the husband may be tenant by the curtesy of an equity of redemption. This point was decided for the first time in the case of *Casborne v. Scarfe*,<sup>o</sup> where the wife, previous to her marriage, mortgaged part of her freehold premises to the defendant for 900*l*. The bill was against the mortgagee and the husband for an account. The husband contended, that having had issue by his wife he was entitled to an estate for life, as tenant by the curtesy, subject to the mortgage of the defendant, Scarfe. The cause was first heard before Sir Joseph Jekyl, who decreed against the claim of the husband. There was an appeal from this decree to Lord Hardwicke, before whom it was insisted, that the wife never had any actual estate in the mortgaged premises during the coverture, but only a power in her to reduce the estate into her possession again by paying off the mortgage; but his Lordship held that an equity of redemption had always been considered as an estate in the land, for it might be devised or entailed with remainders, and therefore could not be considered as a mere right only, but such an estate whereof there may be a seisin, and that the person entitled to the equity of redemption is considered as the owner of the land, and a mortgage in fee is considered as personal assets: that the interest of the land must be somewhere; that it could not be in the mortgagee, because he could not by a devise of all his lands, tenements, and hereditaments, pass the mortgage in fee, unless the equity of redemption had been foreclosed; and that consequently the interest must be in the mortgagor. His Lordship also said, he was of opinion that there was in this case such a seisin of the equitable estate in the wife as was equivalent to an actual seisin of a freehold estate at the common law; that it was often de-

<sup>o</sup> 1 Atk. 603. See *Ld. Hardwicke's judgment in this case, inserted in a note to Lord Chalmers's* *deley v. Lord Clinton*, 2 Jac. & Walk. 194.

cided that a husband shall be tenant by the curtesy of the equitable estate of the wife; and therefore, that he ought to be so in the present case.

Tenancy by the curtesy has all the incidents which belong to the tenancy for life. This tenant is entitled to all the profits of the lands during his life, and he and his underlessee may take all the estovers and hotes necessary for this enjoyment of them.<sup>p</sup> His executors and underlessees are also entitled to emblements: on the other hand, he is punishable for waste,<sup>q</sup> and liable to keep down the interest of all charges on the inheritance, to which it was subject at the time of the marriage.<sup>r</sup>

Incidents of a tenancy by the curtesy.

The acts by which the husband's interest in his wife's estate of inheritance during her life may be barred or destroyed, have been already enumerated, viz. the wife's attainder before issue born, the husband's attainder, his laches, &c. &c. Such acts would of course also prevent the tenancy by the curtesy. But even though the wife should have died seised of an estate of inheritance, and having had issue, capable of inheriting it, and although her husband may have been seised of it jointly with her in her right, still he may by an act in her lifetime have disqualified himself from holding as tenant by the curtesy. As "a man seised of land in the right of his wife, makes a feoffment in fee, and then the estate is made back to the wife, she is thereby remitted, and yet he shall never be tenant by curtesy."<sup>t</sup> These are the words of Hobart, from which it does not appear, whether it be material at what time the feoffment is made, i. e. before or after the birth of issue. In Viner,<sup>u</sup> however, it is stated, that if "husband makes discontinuance of his wife's land and takes back his estate to him and his wife, by which his wife is remitted, *they have issue*, the wife dies, husband shall not be tenant by the curtesy, for he has extinguished his future right by livery." From this authority it would appear that if the

Acts of husband by which he may forfeit tenancy by the curtesy.

By feoffment in fee.

p 2 Black. Com. 122.  
q 2 Black. Com. 283.  
r 1 Atk. 606.

s See Book II. Ch. I.  
t Hob. 338.  
u 7 Vin. 150.

feoffment be *before* issue born, the husband would be barred of his curtesy. But in the account given of the same case in Brooke's Abridgment,<sup>v</sup> it appears that one Judge was of opinion, that the husband shall be tenant by the curtesy, because the *wife* was remitted, and the other Judges were of opinion, that he should not be tenant by the curtesy, because the *husband* was not remitted, and *per* the feoffment gives the right, which he has or might have. However, Lord Coke states the forfeiture of tenancy by the curtesy by feoffment in this way: "A man is *entitled* to be tenant by the curtesy, and maketh a feoffment in fee upon condition, and entereth for the condition broken, and then his wife dieth, he shall not be tenant by the curtesy, because albeit the state given by the feoffment be conditional, yet his title to be tenant by the curtesy, was exclusively absolutely extinct by the feoffment, for the condition was not annexed to it."<sup>w</sup> When Lord Coke says, in this passage, that a man *entitled* to be tenant by the curtesy, forfeited it by a feoffment, he must mean, having a title inchoate by the birth of issue, for before that event he has no title; and, if this be his meaning, the inference would be, that if the feoffment was made before issue born, it would not be a forfeiture of his tenancy by the curtesy, he not having any title to it at the time.

Limitations of an estate of inheritance to a married woman, by which her husband shall not have curtesy.

• The preceding part of this chapter explains the nature of the tenancy by the curtesy, and enumerates the various ways by which it may be barred or forfeited, where the wife has been seised of an estate of which this privilege is an incident. It remains to be stated, by what modes an estate of inheritance may be limited to a married woman, out of which her husband shall not be entitled to his curtesy. It has been already shown, that the husband is entitled to this estate, whenever the wife had a legal estate of inheritance during the coverture, and has had issue by him capable of inheriting it, and that the same privilege has been extended to an equitable estate of inheritance.

<sup>v</sup> Bro. Abr. Tenant by the Curtesy, 6.  
<sup>w</sup> Co. Lit. 30 b.

A distinction, however, is to be observed between these two species of inheritance, namely, that tenancy by the curtesy is an incident so inseparably connected with the legal inheritance of a married woman, that it cannot be severed from it by any condition annexed to the estate at its creation, while an equitable estate of inheritance may be so moulded as to effectually prevent the husband of the inheretrix from having this interest. For, if there be a limitation of a legal estate to a woman and her heirs, with a condition annexed that her husband, after issue, shall not be tenant by the curtesy, he shall notwithstanding be entitled to it: for such a condition is void, being repugnant to the nature of the gift, of which curtesy is one of the incidents.<sup>x</sup> But if there be a gift of an equitable estate of inheritance, accompanied by an express provision that the husband shall not be tenant by the curtesy, a court of equity will enforce a compliance with the intention of the donor. And so it was ruled in *Bennet v. Davis*,<sup>y</sup> where J. S., having married his daughter to a tradesman, devised lands in fee to her for her separate use, exclusively of her husband, to hold the same to her and her heirs, and *that her husband should not be tenant by the curtesy*, nor have these lands for his life, in case he survived his wife, but that they should go upon his wife's death to her heirs; and the Master of the Rolls held that the husband was a trustee for the separate use of the wife, and that though after her death he might be tenant by the curtesy, yet he should be but a trustee for the heirs of the wife.

Devise of equitable estate of inheritance to a married woman, expressly providing that her husband should not be tenant by the curtesy, a bar in equity.

And where a testator devises an estate to a married woman in terms which would give her the equitable inheritance upon trusts, from the nature of which it is manifest that his intention was to exclude the husband from a tenancy by the curtesy, if these trusts be not *executed*, but *executory* only, a court of equity will decree such a conveyance as will make the wife only tenant for life, so as to comply with the wish of the devisor to exclude the hus-

Where the trusts of a devise are executory, and the intent of the devisor is, that the husband of the devisee shall not be tenant by

<sup>x</sup> Mildmay's case, 6 Rep. 41.

<sup>y</sup> 2 P. Wms. 316.

the curtesy, the conveyance will be according to such intent.

band from any interest in the lands after her decease. As in *Roberts v. Dixwell*,<sup>2</sup> where there was a devise to trustees to convey to the testator's daughter for the term of her natural life, and so as she alone, or such person as she should appoint, should take and receive the rents and profits thereof, and so as her husband was not to intermeddle therewith, and from and after her decease, in trust for the heirs of the body of the said daughter for ever. The principal question was, Whether the trust was executed or executory? for if it was executed, the daughter was the tenant in tail, and her husband entitled by the curtesy, the contrary if executory only. Lord Hardwicke considered the trust as executory, that the whole direction fell upon the Court, and that they were to direct how the parties were to convey. That the Court had taken much greater liberties in the construction of executory trusts, than where the trusts were actually executed, and the point which had governed them had been the intention of the testator. That if the wife had been entitled to an estate tail, the husband must have been entitled to be tenant by the curtesy. Notwithstanding, the Court by their authority might have prevented the husband from meddling with the rents and profits during the life of the wife. That as it was plainly the intention of the testator that the husband should have no manner of benefit from the estate, either in the lifetime of the wife or after her decease, (for immediately on the decease of the wife it was to be conveyed in trust for the heirs of her body) the husband of consequence was *absolutely* excluded; for a tenancy by the curtesy depended *absolutely* on an estate tail. And his Lordship, therefore, decreed the estate to be conveyed to the eldest son of the daughter and the heirs of his body, with remainder to the second son and the heirs of his body.

At one time it was considered that a devise to a woman of an estate of inheritance, accompanied by a direction that the rents and profits should be paid to her separate use,

exclusive of her husband, would in itself be an effectual bar to his claim to a tenancy by the curtesy; for which Lord Hardwicke gives this reason in *Hearle v. Greenbank*,<sup>a</sup> that the profits being given to the separate use of the wife, she is thereby made a *feme sole*; and, therefore, that the husband could have no legal seisin during the coverture: he could neither come at the possession nor the profits. Nor could he have an equitable seisin, for that would be directly contrary to the father's intention, and neither in law nor in equity was the husband tenant by the curtesy.

However, his Lordship expressed an opinion directly the reverse of this, on the effect of a devise to the wife for her separate use on the husband's right to curtesy; for in *Roberts v. Dixwell*,<sup>b</sup> his Lordship is reported to have said, "If, therefore, a trust estate is not such a one as is sufficient to bar the husband of his tenancy by the curtesy, the next question will be, Whether the devise to the wife for her separate use will bar him? I am of opinion it will not, because here is a sort of seisin in the wife." So that his Lordship, in one case considered the receipt by the wife of the rents to her separate use a sufficient seisin to entitle the husband to curtesy; and, in the other case, that it was not a difference incapable of being reconciled. But it has been lately decided, in conformity to Lord Hardwicke's first opinion,<sup>c</sup> that a trust of an estate to a married woman for her separate use does *not* prevent the husband's tenancy by the curtesy. This decision was pronounced by the Vice-Chancellor Sir John Leach, in *Morgan v. Morgan*,<sup>d</sup> where previous to marriage part of the estate of the wife was conveyed to trustees in trust, for the separate use of the wife for life, with power to her to appoint the fee by deed or will, and for want of appointment, in trust for her, her heirs and assigns. The question was, Whether the husband, who had survived his wife, was entitled to be tenant

Trust of an estate or inheritance for separate use of married woman, does not bar husband's tenancy by the curtesy.

<sup>a</sup> 3 Atk. 695.

<sup>b</sup> 1 Atk. 607.

<sup>c</sup> *Roberts v. Dixwell*, 1 Atk. 606.

<sup>d</sup> 5 Mad. 408.

by the curtesy of this estate. The plaintiff, who was the son and heir of the wife, relied on the observations of Lord Hardwicke in *Hearle v. Greenbank*<sup>e</sup> as an authority directly in point against the claim of the husband. But the Vice-Chancellor said, that as the two conflicting opinions of Lord Hardwicke, in the cases of *Hearle v. Greenbank*,<sup>f</sup> and *Roberts v. Dixwell*,<sup>g</sup> could not be reconciled, recourse must be had to principle and analogy. That, as at law, where the wife, during the coverture, is seised of an estate of inheritance, the husband having had issue by her capable of inheriting the estate, is entitled to the curtesy; so where the wife is seised of an equitable estate of inheritance, and has issue capable of inheriting it, the husband is equally entitled to the curtesy. That in this case she had an equitable estate of inheritance, notwithstanding the rents and profits were to be paid to her separate use for life. That by the receipt of the rents, she was seised of the estate, and having issue capable of inheriting, the husband must be entitled to the curtesy.

Trust of an estate of inheritance for the separate use of a married woman, does not prevent the husband's tenancy by the curtesy.

e 3 Atk. 716.  
f Ibid.

g 1 Atk. 606.



## CHAPTER III.

OF THE WIFE'S INTEREST IN THE HUSBAND'S ESTATE OF INHERITANCE AFTER HIS DECEASE, VIZ. DOWER, ITS NATURE AND INCIDENTS, AND THE MODES BY WHICH IT MAY BE PREVENTED AND FORFEITED.

THE interest, which the husband has in the wife's estate of inheritance during her life, and after her decease, is the subject of the preceding chapters of this book. If the wife survive her husband, she also, by the common law, may have an interest in his estate of inheritance, which is called her dower. Littleton describes this estate in these terms: "Tenant in dower is where a man is seised of certain lands or tenements in fee simple, fee tail general, or as heir in special tail, and taketh a wife, and dieth, the wife, after the decease of her husband, shall be endowed of the third part of such lands and tenements as were her husband's at any time during the coverture, to have and to hold to the same wife in severalty by metes and bounds for term of her life, whether she hath issue or no, and of what age soever the wife be, so as she be past the age of nine years at the time of the death of her husband, otherwise she shall not be endowed.<sup>a</sup>

Tenancy in dower at the common law.

It appears by the above passage that by the common law the wife shall have only the *third part* of the tenements which were her husband's during the marriage, but by the custom in some places she may have the half, and in others the whole for her dower, and in all these cases she shall be called tenant in dower.<sup>b</sup> By the custom of Gavelkind, the wife shall be endowed of the moiety, so long as she keeps

Dower by the custom.

<sup>a</sup> Co. Lit. 31 a.

<sup>b</sup> Co. Lit. 33 b.

herself sole, and without child, which she cannot waive and take her thirds for her life, for in that case, *consuetudo tollit communem legem*.<sup>c</sup> By the custom of the town of Salop, also, the wife shall have a moiety of socage; but if her husband has socage and chivalry, the wife shall have only a third part.<sup>d</sup> The old law was, that no greater assignment could be made in those cases than of a third part, but less might.<sup>e</sup>

Dower *ad  
ostium  
ecclesie.*

There are two other kinds of dower, viz. dower *ad ostium ecclesie*, and dower *ex assensu patris*. There was another species called dower *de la plus beale*, but the act which abolished the military tenures, has necessarily put an end to this title: the first is, where a man of full age, that is, of one-and-twenty years, seised in fee simple, who shall be married to a woman, and when he cometh to the church door to be married, there after the marriage has been solemnized, he endoweth the woman of the whole land, or of the half or other lesser part thereof, and there openly doth declare the quantity and the certainty of the land which she shall have for her dower. In this case, the wife, after the death of her husband, may enter into the said quantity of land of which her husband endowed her without any assignment.<sup>f</sup>

Dower *ex  
assensu  
patris.*

Dower by the assent of the father is, where the father is seised of tenements in fee, and his son and heir-apparent, when he is married, endoweth his wife at the church door of parcel of his father's lands or tenements with the assent of his father, and assigns the quantity and parcels.<sup>g</sup> The two latter species of dower are assigned after the marriage ceremony has taken place, and are valid without any deed, because the husband cannot make a deed to his wife;<sup>h</sup> besides, she may enter after the death of her husband without any assignment, because the demand of dower is certain in these cases,<sup>i</sup> but when the demand is uncertain, as in writs

c Co. Lit. 33 b.

d Co. Lit. 33 b. note 206.

e Co. Lit. 36 a.

f Co. Lit. 34 a.

g Co. Lit. 35 a.

h Co. Lit. 34 a.

i Co. Lit. 37 a.

of dower at the common law, she shall not take it without assignment.<sup>j</sup> As marriage, seisin of the wife, issue, and the death of the wife, are necessary events to complete the tenancy by the curtesy, so marriage, seisin of the husband, and his death, are requisite for the consummation of the title of dower. The birth of issue is not necessary, for whether the wife have had any or not is immaterial,<sup>k</sup> a circumstance in which tenancy in dower differs from a tenancy by the curtesy, and has an advantage over it.

Requisites for the consummation of the title to dower.

Issue not necessary to perfect wife's claim to dower.

The qualifications of the widow, which are necessary to give her a title to dower, are first to be considered. She must have been the lawful wife of the deceased husband, out of whose lands she claims this estate. And not only must she have been lawfully married, but the marriage must have continued undissolved till the husband's death, for if they have been divorced *a vinculo matrimonii* she cannot be endowed.<sup>l</sup> But a divorce *a mensa et thoro* does not disqualify her.<sup>m</sup> She must also have been the wife of a person who at the time of the marriage was of sound mind, as a man of unsound mind is incapable of contracting,<sup>n</sup> although in the time of Lord Coke the law was held to be otherwise.<sup>o</sup> She must also have arrived at the age of nine at the time of her husband's decease; if she be of this age, it is immaterial at what age she was married, or how young her husband was when he died, albeit, as Lord Coke says, he were but four years old. she shall be endowed.<sup>p</sup> However, a marriage between persons of this immature period of life was accounted valid only *quoad dotem*, that is, only so far as to give a widow, who had been thus married, a right to dower. For the woman was incapable of consenting before twelve, and the man before fourteen, and if either should disagree at the age of consent, the marriage would be void, although if the husband should die before he at-

Woman divorced *a vinculo matrimonii*, not dowerable.

Wife of a man unsound in his mind at the time of the marriage, not dowerable. Wife not dowerable, if not of the age of nine years at her husband's decease.

Woman incapable of consenting to marriage before

<sup>j</sup> Co. Lit. 37 b.

<sup>k</sup> Co. Lit. 30 b. sect. 36.

<sup>l</sup> Co. Lit. 33 b.

<sup>m</sup> Id. l.

<sup>n</sup> 2 Black. 130.

<sup>o</sup> Co. Lit. 31 a.

<sup>p</sup> Co. Lit. 33 a.

twelve,  
and the  
man.  
before  
fourteen  
years of  
age.

A seisin in  
law by the  
husband,  
sufficient  
to give  
widow a  
right of  
dower.

Seisin of  
husband  
not neces-  
sary to be  
continued.

Widow not  
dowable  
out of lands  
given and  
taken in  
exchange.

Widow not  
dowable  
out of an  
instanta-  
neous sei-  
sin.

tained his age of fourteen, the marriage would be lawful, and the wife's title to dower would be complete. And although she is not dowable until her age of nine, yet she is conditionally dowable, *i. e.* if she attain this age before her husband's decease; so much so, that if he aliene his land, and then after the alienation the wife attain her age of nine years, and after the husband dies, she shall be endowed.<sup>q</sup>

Seisin of the husband is also a necessary ingredient to perfect the widow's right to dower. However, it is not necessary that he should have had a seisin in fact, a seisin in law will be sufficient. As where lands or tenements descend to the husband, before entry he hath but a seisin in law, and yet the wife shall be endowed, albeit it be not reduced to an actual possession.<sup>r</sup> And the reason given by Lord Coke for a seisin in law by the husband being sufficient to entitle his wife to dower, while a seisin in deed is required to entitle the husband to curtesy, is, that "it lieth not in the power of the wife to bring it to an actual seisin, as the husband may do of his wife's land, when he is to be tenant by the curtesy."<sup>s</sup>

But although seisin by the husband is necessary at some period of the marriage, still it need not be a continual seisin, for if he aliene the land, the wife shall, notwithstanding, have her dower out of it, even in the hands of the alienee. If, however, the alienation take place as a mere exchange of lands, the widow shall not be endowed of the lands given and of the land taken in exchange, and yet the husband was seised of both.<sup>t</sup> So, if the husband's seisin be instantaneous and for a purpose merely temporary, his wife shall not be endowed; as, if the conusee of a fine grant and render the land to the conusor, the wife of the conusee shall not be endowed; for which Lord Coke gives this reason, "for it is not possible that the husband could have endowed his wife of such an estate, as the usual pleading is, *quia dicit quod W. quondam vir suus nunquam fuit sei-*

<sup>q</sup> Co. Lit. 33 a.  
<sup>r</sup> Co. Lit. 31 a.

<sup>s</sup> Co. Lit. 91.  
<sup>t</sup> Co. Lit. 31.

*situs de tenementis predictis de tali statu, ita quod eandem A. inde dotasse potuit.*"<sup>u</sup>

And the wife is not entitled to dower in every instance, even out of the estate of inheritance of which her husband was continually seised, and for his own use and benefit ; for although she is dowable out of the legal estate of inheritance, of which her husband was seised, she cannot be endowed out of his equitable estate, for a wife was not dowable of a use before the statute of the 27 Hen. 8. c. 10. ;<sup>v</sup> and it is now a settled rule of law that she cannot be endowed out of a trust estate,<sup>w</sup> although the husband may be tenant by the curtesy of such an interest in land. Nor shall she be endowed of lands which the husband held in joint tenancy with another at the time of his death, for the joint tenant claims all by survivorship, which is above the title of dower.<sup>x</sup>

Widow not dowable out of a trust estate

Widow not dowable out of lands held in joint-tenancy by the husband at his death.

Acts of husband by which wife may be barred of dower.

Although the husband should die sole seised of a legal estate of inheritance in lands, still his wife may have been barred of or deprived of her title to dower by some act of his or of her own, or by a joint act of theirs. The acts of the husband, by which his wife may be disentitled to dower, may be before or during the marriage. The acts of the wife producing the same effect, may be at the time of the marriage, during it, or after its termination. And, first, of the acts of the husband : He bars his wife of all claim to dower by a jointure made upon her *before* the marriage, in pursuance of the provisions of the 27 Hen. 8. c. 10. ;<sup>y</sup> *during* the marriage, if he commit high or petit treason, and be attainted for it, she shall not have dower, although the treason were committed after the title to dower had commenced.<sup>z</sup> And his subsequent pardon will not restore her right, so long as the attainder remains in force.<sup>a</sup>

By jointure according to the 27 Hen. 8. c. 10. before marriage.

By his attainder for treason.

So if the husband levy a fine with proclamations of his lands, and dies, if the wife do not make her claim within

By a fine with proclamations.

<sup>u</sup> Co. Lit. 31 b.

<sup>v</sup> 4 Rep. 1 b.

<sup>w</sup> Godwin v. Winsmore, 2 P. Wms. 525.

<sup>x</sup> Co. Lit. 37 b.

<sup>y</sup> 10 Car. 1. c. 1. Ireland ; and see Chap. 4. of this book.

<sup>z</sup> Co. Lit. 31 a.

<sup>a</sup> Co. Lit. 37 a.

five years after his death she shall be barred of her dower ; for the 32 Hen. 8. c. 26.; which remedies the discontinuance by fine, doth not mean a fine with proclamations.<sup>c</sup>

By fine and recovery by husband and wife.

Husband and wife also may by their joint act during the marriage bar her of dower, as if they join in levying a fine or suffering a common recovery ; and she is barred for this reason, that in both cases she is examined upon record by the judges as to her consent.<sup>d</sup>

Acts of wife by which she forfeits dower.

Before marriage. By inducing son and heir under age, &c. to marry her.

The wife alone may also by her conduct before the marriage disqualify herself from having dower ; for if she “ by subtile means, or secret insinuations and delusions, threats or menaces, persuade or procure the son and heir-apparent, or other son of any person having land of the yearly value of 50*l.*, or personal estate of 500*l.* value, or shall by such means persuade or procure the eldest or any other son of any person deceased to contract matrimony without the privacy or consent of the parents or guardians of such son, and such matrimony be had before such son attain the age of twenty-one years, such persons so contracting matrimony are rendered incapable, and for ever disabled to sue for, recover, or demand any dower, &c. &c. out of the estate of such son, &c. &c.” The above statute is confined to Ireland, no such disqualification being annexed to such an act in England.

Acts of wife during marriage by which she forfeits dower.

By elopement and tarrying with adulterer.

In like manner the wife may forfeit her right to dower by her own acts during the marriage ; as if she elope with an adulterer, and tarry with him, she shall lose her dower by the statute of Westm. 2 c. 34 , unless her husband be voluntarily reconciled to her. And if she go willingly to or with an adulterer, this is a departure and a tarrying within the meaning of the above statute, although she do not remain continually with him, or if she tarry with him against her will, or if he turn her away, or if she cohabit with her husband by the censures of the church, in all these cases she loses her dower.<sup>f</sup> And even where the husband

c 2 Co. Rep. 93. 10 Co. Rep. 49.  
13 Co. Rep. 20.  
d 10 Co. Rep. 49.

e 6 Ann. c. 16. Irish.  
f Co. Lit. 32 a, b.

made a grant of his wife with her goods to another, by force of which the wife lives with the grantee during the life of the husband, she shall lose her dower, because she lived in adultery with him.<sup>g</sup> And if she be taken away from her husband even against her will, yet if she afterwards consents and remains with the adulterer, still she shall lose her dower, for the remaining with him without reconciliation is the bar of dower, and not the manner of going away.<sup>h</sup> But if the husband be afterwards reconciled to her according to the statute,<sup>i</sup> it is said that then she shall be endowed, although the husband had aliened the land in the meantime.<sup>j</sup> She is incapable of having dower also if she be attainted of felony, but if she be pardoned before the death of her husband, she shall be endowed, though the husband had aliened his land before the attainder.<sup>k</sup> And it seems that if the wife be attainted, and then the husband purchases land and alienes it again, and then the wife is pardoned, she shall have dower of the land, which was purchased and aliened during the time she was not dowerable.<sup>l</sup>

By her attainder of felony.

And the widow may be prevented from ever taking dower by her own misconduct, not only during the lifetime of her husband, but she may forfeit all claim to it, even after his decease, by the same means : as if she detain the title-deeds of the estate from the heir. And accordingly, if she bring an action of dower, and the heir plead that she has detained his title-deeds, and she replies by denying the detainer, and the issue be found against her, she shall be barred of her dower for ever.<sup>m</sup> But where the heir pleads detainer of charters, he must plead, that, from the time of the death of his ancestor, he was always, and still is, ready to assign her dower, if she would deliver the charters.<sup>n</sup> Besides, if the widow be with child, the heir cannot

Acts after marriage by which widow may forfeit dower.

By detainer of title-deeds concerning the lands, subject to dower.

g Co. Lit. 32 a. note 135.

h 2 Bac. Ab. 142.

i West, 2 C. 34.

j 2 Bac. Ab. 142.

k Co. Lit. 33 a.

l Co. Lit. 33 a. note 202.

m 2 Bac. Ab. 143.

n Salk. 252.

plead detinue of charters, for the widow may keep them for the infant.<sup>o</sup> However, the title-deeds of which the heir pleads the detainer, must concern the lands out of which the dower is demanded; and the detainer will be a bar for no more lands than the deeds concern.<sup>p</sup> It has been also said, that if a widow pretends to be enseint by her husband, when in truth she is not, by which the heir is disturbed in his inheritance, she shall lose her dower.<sup>q</sup>

By pretending to be enseint by her husband.

Widow forfeits her dower by aliening it.

The widow may also forfeit her dower after it has been assigned to her by aliening it, an act which gives the heir of the husband a right to recover the lands by action. For if a woman sell or give in fee, or for term of life the land that she holdeth in dower, it is ordained, that the heir or other to whom the land ought to revert after the death of such woman, shall have present recovery to demand the land by a writ of entry made thereof in the Chancery.<sup>r</sup>

Alien wife not dowerable, unless she be made denizen or be naturalized.

Besides these acts before, during, and after the marriage, by which the wife may be barred of or forfeit her dower, she may also, without any fault imputable to her, labour under an original disability to take this estate: for if she be an alien, she shall not be endowed.<sup>s</sup> There is an exception, however, in favor of the wife of the king: for if he take an alien born to wife, and die, she shall be endowed by the law of the crown.<sup>t</sup> However, the alien wife, even of a subject, may be rendered capable of taking dower, by being made denizen;<sup>u</sup> but denization has no retrospective force; for if a man marry an alien, and afterwards sells his land, and she is then made denizen, she shall not be endowed.<sup>v</sup> But if she be naturalized by act of parliament, then she shall be endowed, notwithstanding the previous sale of his estate by her husband.<sup>w</sup>

Modes of preventing the right of dower from

These are the means by which the wife may forfeit the dower to which she had acquired an incipient right, or in which her title was consummate. The husband may, no

o Baron & Feme, 116.  
p 2 Bac. Ab. 143.  
q 2 Bac. Ab. 141  
r Stat. Glouc. 6 Ed. 1. c. 7.  
s Co. Lit. 31 b. 33 a.

t Co. Lit. 31 b.  
u Co. Lit. 33 a.  
v Ibid.  
w Ibid.



doubt, before marriage, prevent this right from ever attaching upon his inheritance, by making a jointure on his intended wife, according to the 27 Hen. 8. c. 10.; but if he have not done so, not only the sole legal estate of inheritance, of which he was seised at the time of the marriage, but any future estate of the same kind, which he acquires during the marriage will be chargeable with dower. For this reason, it has employed the ingenuity of conveyancers to devise contrivances, by which husbands may purchase estates of inheritance, to which the title of dower shall not attach, although their wives have not been prevented by settlements before marriage. And the plans adopted for this purpose have their foundation in the exemption of joint estates and equitable estates of inheritance from the claim of dower. The modes of effecting this object are various. Sometimes the estate is limited to the purchaser, and a trustee and their heirs, but as to the estate of the trustee and his heirs, in trust for the purchaser and his heirs. Mr. Butler objects to this plan, because it exposes the purchaser to the chance of the trustee's dying in his, the purchaser's lifetime, in which event the right of dower would attach;<sup>x</sup> for, although, so long as the joint-tenancy subsists, the right to dower cannot arise, yet, if the trustee should die before the purchaser, he would be then solely seised. Another plan, with the same view, is, to limit the estate to the purchaser and a trustee, and the heirs of the trustee, but in trust for the purchaser.<sup>y</sup>

attaching upon estates purchased during the marriage.

By a limitation to the purchaser and a trustee and their heirs, in trust for the purchaser and his heirs.

By a limitation to the purchaser and a trustee and purchaser.

Sometimes the estate is limited immediately to the trustee and his heirs, in trust for the purchaser and his heirs,<sup>z</sup> but all these modes are objected to by Mr. Butler, because "they keep the legal fee from the purchaser, and expose him to all the inconvenience of its escheating to the crown for want of heirs to the trustee, or of its becoming vested in infants, married women, or persons residing at a distance, not easily discoverable, or not willing to join in the

By a limitation to trustee and his heirs, in trust for the purchaser and his heirs.

<sup>x</sup> Mr. Butler's note 330. Lit. 379 b.

<sup>y</sup> Ibid.  
<sup>z</sup> Ibid.

conveyances required to be made of it." Mr. Butler further objects to these modes on this ground, that "sometimes even it may be considered to pass in the general devise of the trustee's will, and by that means become settled at law to uses in strict settlement, and therefore not to be regained but by a fine or common recovery, and till the existence of a tenant in tail not to be regained without the aid of Parliament." To prevent these inconveniences, Mr. Butler recommends, that, "the estates may be first limited to such uses as the purchaser shall by deed or will appoint, and for want of appointment to the use of a trustee, his heirs and assigns during the life of the purchaser in trust for him, and subject thereto, to the use of the purchaser, his heirs and assigns." He adds, "if this method be adopted, no doubt will remain of the wife's right of dower being effectually prevented; the purchaser during his life will have the absolute command of the legal fee, and at his death it will descend upon his heir." Mr. Butler adds another mode, which he mentions as having been suggested by Mr. Fearne, in his *Essay on Contingent remainders*, fourth edition, fol. 509, note. "The lands may be limited to the appointees of the purchaser in the fullest manner, and on default of appointment, to the use of him and his assigns during his life; and from and after the determination of that estate by any means in his lifetime, to the use of some person and his heirs during the natural life of the purchaser, in trust for him and his assigns, and from and after the determination of the estate so limited in use to the said trustee and his heirs, to the use of the purchaser, his heirs and assigns for ever."

By a limitation to such uses as the purchaser shall appoint, and for want of appointment, to the use of a trustee, his heirs and assigns, during life of purchaser, in trust for him, and subject thereto to the use of purchaser, his heirs and assigns.

By limitation to the appointees of the purchaser, and in default of appointment to the use of him and his assigns during his

life, and after the termination of that estate in his lifetime, to the use of trustee during life of purchaser, and after termination of estate of trustee and his heirs, to the use of purchaser, his heirs and assigns.

## CHAPTER IV.

OF JOINTURES AT THE COMMON LAW, AND ACCORDING TO THE  
27 HEN. 8. c. 10.

It has been seen that dower at the common law is an incident unalienably annexed to the legal inheritance of the husband, (as curtesy is to that of the wife,) unless it be barred by dower *ad ostium ecclesie* or *ex assensu patris*, or be prevented or forfeited by some of these acts of the husband or of the wife, which have been already described. Even a jointure, however equivalent, which had been made by the husband before or during the marriage, in full satisfaction of the wife's dower, would not have been a bar to it, but she would have been entitled to both the jointure and the dower. As if a man, in consideration of a marriage afterwards to be had with A., makes an estate of certain lands to her for her life, in full satisfaction of all the dower which after marriage may accrue to her in any of his lands, and afterwards they intermarry, that was no bar of her dower at the common law.<sup>a</sup> So if the husband had purchased or caused an estate to be made to him and his wife for life, or in tail, in full satisfaction of her dower, and had died, that was no bar of her dower, for two reasons; first, because she had no title of dower at the time of the acceptance of the satisfaction, but it accrued after. Secondly, because no collateral satisfaction can bar any right or title of any freehold or inheritance.<sup>b</sup> And even after the death of the husband, when the woman has a perfect title of dower, if the heir makes an estate to the wife for life of any land, whereof she was not dow-

At the common law, a jointure not a bar of dower, but wife would take both.

<sup>a</sup> Vernon's case, 4 Rep. 1 b.

<sup>b</sup> Ibid.

able, in full satisfaction of her dower, that was no bar of her dower, it being a collateral satisfaction for a title to a freehold.<sup>c</sup> However, although the wife might have had her dower, and the jointure, she could not have had two dowers; namely, one at the common law, and one *ad ostium ecclesiæ*, or *ex assensu patris* for the wife of one husband can have but one dower.<sup>d</sup>

A jointure according to the 27 Hen. 8. c. 10. a bar of dower.

If jointure be not according to this act, the widow entitled to it and dower.

Such was the law before the 27 Hen. 8. c. 10.<sup>e</sup> commonly called the statute of uses; but by the enactments of this statute a jointure possessing the qualities required by its provisions is declared to be a bar to the widow's claim of dower, and if it be not conformable to the act, then she is declared to be entitled, as before at law, to both the jointure and her dower. The introduction of this clause respecting jointures into the statute of uses, is very satisfactorily accounted for by Lord Coke in his report of Vernon's case.<sup>f</sup> He says, "Before the making of the statute of 27 Hen. 8. c. 10. the greatest part of the land in England was conveyed to sundry persons to uses, and forasmuch as a wife was not dowable of uses,<sup>g</sup> her father or friends, upon her marriage procured the husband to take an estate from his feoffees or others seised to his use, to him and to his wife before or after marriage for their lives, or in tail for a competent provision for the wife after the husband's death; then comes the 27 Hen. 8., which transfers the possession and the estate of the lands to the use, by which the husbands were seised accordingly, and by consequence, if further provision had not been made, the wives would have had as well their dowers as their jointures, for the reasons aforesaid; and for this reason the branches concerning jointures were added to the said statute 27 Hen. 8." And accordingly, since the passing of this act, the common law right of a woman to the third part of all the lands and tenements whereof her husband was seised at any time during the coverture to hold for the term of her natural life, may be

<sup>c</sup> Vernon's case, 4 Rep. 1 b. Dyer.  
91.

<sup>d</sup> Co. Lit. 36 b.

<sup>e</sup> 10 Car. 1. c. 1. in Ireland.  
<sup>f</sup> 4 Rep. 1 b.  
<sup>g</sup> Dyer. 266.

prevented by a jointure. This statute regulates the terms of the provision which is to preclude a woman from demanding dower out of her husband's estate after his decease. It recites, "That whereas divers, persons have purchased or have estate, made and conveyed, of and in divers lands, tenements, or hereditaments, unto them and to their wives, and to the heir of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for term of their lives, or for term of life of the said wife ; or where any such estate or purchase of any lands, tenements, or hereditaments, hath been, or hereafter shall be made to any husband, and to his wife in manner and form above expressed, or to any other person or persons, and to their heirs and assigns, to the use and behoof of the said husband and wife, or to the use of the wife, as is before rehearsed, for the jointure of the wife ; that then and in every such case, every woman married having such jointure made, or hereafter to be made, shall not claim nor have title to have any dower of the residue of the lands, tenements, or hereditaments, that at any time were her said husband's, by whom she hath any such jointure, nor shall demand or claim her dower, of and against them that have the lands and inheritances of her said husband ; but if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower by writ of dower, after the due course and order of the common law of this realm."

This statute proposes five different plans of jointures for the wife ; first, to the husband and wife and to the heirs of the husband ; secondly, to the husband and to the heirs of their two bodies ; thirdly, to the husband and wife and to the heirs of the body of one of them ; fourthly, to the husband and his wife for their lives ; fifthly, to the husband and wife for the life of the wife. It has, however, been resolved, that these are not the only forms of settlements by which dower may be barred under this statute, for that these five particular forms are put for examples only, and

Plans of jointures proposed by the acts which shall be bars of dower.

Jointure made before marriage, not exactly in the terms of

the act, which are held to be within the equity of it.

Limitations of estates for jointures which have been held to be a bar of dower within the equity of 27 Hen. 8. though not within the terms of it.

An estate for life upon condition a good jointure within the intent of the act, if the widow enters and accepts the conditional estate.

not to exclude any other estate, which is to a similar effect, and agrees with the intent of the makers of the act.<sup>h</sup> It would seem that if the settlement secure a competent livelihood of freehold for the wife for her life, and commence immediately from her husband's decease, it will be a sufficient bar of dower under this statute. whatever the form of the settlement may be. For instance, it was resolved in Vernon's case, that if a man makes a feoffment to the use of himself for life and afterwards to the use of his wife for her life, for the jointure of his wife, such estate in remainder is within the intent of the 27 Hen. 8.,<sup>i</sup> because this estate would be equally beneficial to the wife as if the limitation had been to the husband and wife for their joint lives. In like manner, where an estate was limited to the wife alone for her life, before marriage, in lieu of dower, it was held to be a bar of dower. As in Ashton's case, where the father, in performance of certain covenants between his son and the daughter of Sir William Bavenport, made a feoffment to the use of her for life for her jointure, they afterwards intermarry, and the husband dies: this was held to be a bar to her claim of dower, although the five examples in the statute are of joint estates to husband and wife.<sup>j</sup> So, in the Duchess of Somerset's case it was adjudged, that where the Duke of Somerset purchased lands to him and to the Duchess his wife, and to the heirs male of their two bodies, that although it was not any of the estates put for example in the said act, yet it was within the intent of it.<sup>k</sup> So an estate in fee simple conveyed to the wife for her jointure is within the act.<sup>l</sup>

And although dower at the common law was an absolute estate for life, and the statute intended a jointure to be in lieu of, and as a satisfaction for it, still it has been adjudged, that if the jointure be an estate for life, upon condition, it is within the words and intent of the act, because it is an estate for life, for that a jointure is a competent livelihood of freehold for the wife, to take effect immediately after the

<sup>h</sup> Vernon's case, 4 Rep. 2 a.  
<sup>i</sup> 4 Rep. 2 a.  
<sup>j</sup> Dyer. 328.

<sup>k</sup> Dyer. 96.  
<sup>l</sup> 4 Rep. 3 b. Dyer. 215

death of the husband, for the life of the wife, if she herself is not the cause of the determination of it.<sup>m</sup> As if a man makes a feoffment in fee, to the use of himself for his life, and after to the use of his wife *durante viduitate* for her jointure, that is an estate for her life, and it cannot determine without her own act, and therefore it is a jointure within the said act;<sup>n</sup> so where the feoffment was to the use of the husband for his life, and after his decease, to the use of the demandant for the term of her life, upon condition that he should perform the last will of her husband, it was adjudged to be a bar of dower within the act.<sup>o</sup> But it would seem that a jointure of this description, although it were before marriage would not be binding on the widow, unless, after the husband's death, she enters and accepts the conditional estate.<sup>p</sup>

. Lord Coke<sup>q</sup> specifies six requisites to the making of a perfect jointure within this statute. First, her jointure by the first limitation is to take effect for her life in possession or profit presently after the decease of her husband. Secondly, that it be for the term of her own life, or greater estate. Thirdly, it must be to herself, and to no other for her. Fourthly, it must be made in satisfaction of her whole dower, and not of part of her dower. Fifthly, it must either be expressed or averred to be in satisfaction of her dower. Sixthly, it may be made either before or after marriage.

Requisites of a perfect jointure within the statute.

With respect to the necessity of the estate to the wife taking effect immediately after the death of the husband, it has been ruled, that if a man make a feoffment in fee of lands or tenements either before or after marriage to the use of the husband for life, and after to the use of A. for life, and then to the use of the wife for life, in satisfaction of her dower, this is no jointure within the statute, because by the first limitation it was not to take effect in possession or profit presently after the death of the husband. For A.

Jointures which have been held to be insufficient to bar dower.

<sup>m</sup> Vernon's case, 4 Rep. 2 b.

<sup>n</sup> Ibid. 4 Rep. 3 a.

<sup>o</sup> Ibid. 4 Rep. 1 a.

<sup>p</sup> 4 Rep. 2 b.

<sup>q</sup> Co. Lit. 36 b.

may live longer than the wife, by which means she would be excluded altogether from any provision out of her husband's lands. And as this jointure would be no bar to dower according to the statute, the wife would of course be entitled both to her dower and the jointure, although A. were to die in the lifetime of the husband.<sup>r</sup>

So where an estate was settled before marriage on the husband's mother for life, remainder to the wife for life in full satisfaction of all dower or thirds at the common law, or by custom or otherwise, it was admitted to be so precarious a provision, as the mother might outlive the husband (which happened to be the case), that it could not be a bar at law.<sup>s</sup> The principal point in this case was, whether such a settlement before marriage upon a female *infant* would be a bar of dower in a court of equity, and it was held that it would not.

It must be observed, that when it is said that a jointure must take effect immediately on the death of the husband, a civil death is intended as well as a natural death, and therefore, if the husband enters into religion, is banished, or abjures the realm, the wife shall have her jointure,<sup>t</sup> although such a death would not entitle her to dower.<sup>u</sup>

In the next place, the estate must be either in fee tail, or for term of her own life, for an estate for life or lives of one or many others, or to her for a hundred or a thousand years, &c. if she lives so long; or without such limitation, is no bar of dower, although they be expressly made in satisfaction of her dower.<sup>v</sup> As if the husband makes a feoffment in fee to the use of his wife for another's life, for her jointure, it is not within the act, for the estate is not for the wife's life, and it may determine without her act or default, during her life, and thereby she will be destitute of a livelihood.<sup>w</sup> It is to be observed, that although

<sup>r</sup> Co. Lit. 36 b. 4 Rep. 2 b.  
<sup>s</sup> Caruthers v. Caruthers, 4 Br.  
 C. C. 499.  
<sup>t</sup> 3 Bac. Ab. 223. Co. Lit. 133.  
 Moor. 851.

<sup>u</sup> Co. Lit. 33 b.  
<sup>v</sup> Co. Lit. 36 b.  
<sup>w</sup> 4 Rep. 3 a. Hob. 40. 153.



Lord Coke seems to exclude a fee simple from the class of estates, which would be a bar to dower, yet he could not have intended it, as an instance is stated by himself in Vernon's case,<sup>x</sup> where a fee simple was decided to be within the equity of the statute of 27 Hen. 8.

So if an estate be made to others in fee simple, or for her life upon trust, so as that the estate remain in them, although it be for her benefit and by her assent, and by express words to be in full satisfaction of her dower, yet this is no bar of her dower.<sup>y</sup>

A devise by will also is no bar of dower, under the statute, unless it be expressly stated in it to be in satisfaction of dower.<sup>z</sup> But if it be expressed in the will to be in satisfaction of dower, then it is a bar. It was argued, that a devise could be no bar of dower under the 27 Hen. 8.

A devise a satisfaction of dower under the statute, if expressed to be so.

First, because land was not devisable until the 32 Hen. 8. and that therefore a devise of land, which then by the law could not have been made, could not be within the 27 Hen. 8. Secondly, because every jointure within the act of 27 Hen. 8. is made and assured either before or during the coverture, but a devise takes its effect after the husband's death. To the first objection it was answered, that although land was not devisable until the 32 Hen. 8. yet it is frequent in our books, that an act made of late time shall be taken within the equity of an act made long time before. And to the second objection it was answered, that it was a jointure within the act of 27 Hen. 8. for as an estate for life made to a woman for her jointure before marriage, when she is not his wife, is within the equity of the said act, so an estate for life, devised to a woman for her life, which takes effect after his death, when the marriage is dissolved, is also within the equity of the said act, for such estate well agrees with the intent of the makers of it.

But although the limitation to the wife be in exact conformity to the provisions of the act; still if it be made for

A provision made before marriage

<sup>x</sup> 4 Rep. 3 b.  
<sup>y</sup> Co. Lit. 36 b.

<sup>z</sup> Co. Lit. 36 b.  
<sup>a</sup> Vernon's case, 4 Rep. 4.

for part of  
a jointure,  
no bar of  
dower.

part of a jointure only, it will be no bar to dower. For if lands are conveyed to a woman *before* marriage, for part of her jointure, and after marriage more land is conveyed to her for her full jointure, and in satisfaction of her whole dower, and afterwards the husband dies, in that case, if the wife waives the land conveyed to her use after her marriage, she shall have the land conveyed to her before the marriage, and her dower also in the residue ; for land conveyed to a woman in part of her jointure, or in satisfaction of part of her dower, is no bar (for the uncertainty) of any part of her dower. The words of the act are, for the jointures of wives, and not for part of their jointures.<sup>b</sup>

Also, if the limitation be to the husband for life, remainder to his wife and A. for their lives, that would not be a good jointure, because the settlement, not being to the wife alone, it is not a case mentioned in the statute.<sup>c</sup>

Such are the various decisions which have been made on the sufficiency of conveyances to constitute a legal bar of dower within the 27 Hen. 8. A distinction must, however, be observed between the operation of a *deed* and a *devise* conveying a provision to a woman as a jointure ; if it be by deed, the estate conveyed by it may be averred to be for the jointure of the wife, although it be not so expressed in the instrument, but if the land be *devised* by a man to his wife for term of her life generally, it cannot be averred to be for the jointure of the wife, and in satisfaction of her dower.<sup>d</sup>

If a provision be made for the wife after the marriage, she is not barred of dower.

Another distinction to be observed is, between conveyances made of estates in lieu of dower before, and after the marriage has taken place. If the settlement be before marriage, and be in conformity to the requisites of the act, then the widow will be bound by it, and cannot claim her dower ; but if the provision be made after marriage, then she is not bound by it, whether it be conformable or not, but may, after her husband's death, waive it, and prefer her dower. This distinction arises from the eighth section

b 4 Rep. 3 a.  
c Winch. 33.

d 4 Rep. 1.

of the statute of 27 Hen. 8., which provides, "That if any wife have, or hereafter shall have, any manors, lands, tenements, or hereditaments. unto her given, or assigned after the marriage for term of her life or otherwise in jointure, (except the same assurance be to her made by act of Parliament,) and the said wife, after that fortune to over-live the same, her husband, in whose time the said jointure was made or assured unto her, that then the said wife so over-living, shall and may at her liberty, after the death of her said late husband, refuse to have and take the lands and tenements so to her given, appointed or assured during the coverture, for term of her life or otherwise in jointure, (except the same assurance be to her made by act of Parliament, as is aforesaid,) and thereupon to have, ask, demand, and take her dower by writ of dower, or otherwise, according to the common law, of and in all such lands, tenements, and hereditaments, as her husband was and stood seised of any estate of inheritance at any time during the coverture." Accordingly, it was resolved in *Vernon's case*,<sup>e</sup> in which the jointure was made during the marriage, that if a jointure is made to a woman before marriage, the wife cannot waive it after the husband's death and take her dower, as she may of a jointure made to her during the marriage, and that by force of the above recited proviso; the effect of which was, that if the jointure was made before marriage, that the intent of the makers of the act was, that she should not refuse, but should take such jointure as was made to her. And, in the case of *Leicester v. Haydon*,<sup>f</sup> Anderson, speaking of this proviso, observed, that "for as much as it speaks of an assurance after marriage, it has been held, that if the assurance be made before marriage, she shall not refuse it, for the judges took the intent of the makers of the act to be so by the implication of the words." It has also been held, that under this proviso the wife might refuse her jointure *in pais*, and be endowed by consent *in pais*, or by writ in dower.<sup>g</sup>

<sup>e</sup> 4 Rep. 3 a.  
<sup>f</sup> Plowd. 396 b.

<sup>g</sup> 3 Rep. 27.

What acts of widow amount to a refusal.

1st. An actual refusal *in pais*.

2d. Bringing a writ of dower.

3d. Acceptance of dower by deed.

A female infant bound by settlement on her previous to marriage.

As the power of refusing or accepting the jointure made to her during the marriage is given to the widow by the above act; it is now to be considered what acts will amount to a refusal, and what to an acceptance. And, first, the widow may refuse to enter and accept the rents without any deed of surrender, but by a mere refusal *in pais*.<sup>b</sup> So if she bring a writ of dower and have judgment of a third part, she has estopped and concluded herself to claim any other estate, for by this act she has affirmed herself to have a title to dower only.<sup>i</sup> It has also been ruled, that an acceptance by deed indented of dower, concludes the wife of this right.<sup>j</sup> When it is said that a woman is barred of her dower within this statute by a jointure made before marriage, it must be understood as well of a jointure settled on an infant as on an adult; for as the law now stands, an infant female is bound by a settlement made previous to her marriage, and cannot dissent from it after her husband's death, and elect her dower. Lord Northington held an opposite opinion in *Drury v. Drury*,<sup>k</sup> and decided, accordingly, that an infant wife was not bound by a jointure settled upon her previous to her marriage, and that such a jointure might be waived by her after the coverture. There was an appeal to the House of Lords from this decree; and after counsel had been heard, their Lordships proposed the following question to the Judges: "Whether a woman married under the age of twenty-one years, having before such marriage a jointure made to her in bar of her dower, is thereby bound and barred of dower within the statute 27 Hen. 8. c. 10.?" The Judges having different opinions on this question, were directed to deliver them *seriatim*, with their reasons; and accordingly, Mr. Baron Gould, Lord Chief Baron Parker, and the Lord Chief Justice of the C. P. (Pratt) supported the negative; Mr. Justice Wilmot, Mr. Justice Bathurst, Mr. Baron Adams, and Mr. Baron Smythe, were for the affirmative; and the decree of

<sup>h</sup> 3 Rep. 27.

<sup>i</sup> Baron & Feme, 166.

<sup>j</sup> Baron & Feme, 166.

<sup>k</sup> 2 Eden, Rep. 39.

Lord Northington was accordingly reversed.<sup>1</sup> The cases principally relied on in the case of *Drury v. Drury*<sup>m</sup> in favour of the proposition that a jointure settled on an infant wife previous to her marriage, could not be waived by her afterwards, were *Price v. Seys*,<sup>n</sup> and *Hervey v. Ashley*,<sup>o</sup> in which Lord Hardwicke decided, that if a man married, and before marriage, in consideration of it and her portion, makes a jointure on his wife, though she was an infant, she cannot waive her jointure. The opinion of Lord Hale also, as expressed in a marginal manuscript note of his *Coke on Littleton*, was relied on. The passage to which his Lordship annexed the note was this, "if a jointure be made before marriage, the wife cannot waive it, and claim dower at common law; to which his Lordship added, "licet ell soit diens age ne poet wave, ut videtur." In *Cammel v. Buckle*,<sup>p</sup> also, Lord Macclesfield says, in illustration of a position he had laid down, "Suppose a feme infant seised in fee, on a marriage with the consent of her guardians, should covenant, in consideration of a settlement, to convey her inheritance to her husband, if this were done in consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages."<sup>q</sup> And in *Seamer v. Bingham*,<sup>r</sup> Lord Hardwicke says, "I agree there are cases where a father contracting for an infant child, shall bind the child, especially if the child claim any thing under the settlement; but then it must be before marriage, and in consideration of the marriage."<sup>s</sup>

Such has been the result of this important question, which may be now considered as finally settled; although, in addition to the great authority of Lord Northington, and of the three law Judges who supported his Lordship's decree in the House of Lords, Lord Thurlow,<sup>s</sup> has been said

<sup>1</sup> *Earl of Buckinghamshire v. Drury*, 2 Eden's Rep. 60.

<sup>m</sup> Eden's Rep. 39.

<sup>n</sup> *Barnardiston*, Ch. Rep. 117.

<sup>o</sup> 3 Atk. 607.

<sup>p</sup> 2 P. Wms. 243.

<sup>q</sup> See *Ld. Northington's* observations on this passage, 2 Eden's Rep. 58.

<sup>r</sup> 3 Atk. 56.

<sup>s</sup> 18 Ves. 275.

to have expressed himself strongly in favour of the first decree in *Drury v. Drury*.<sup>t</sup>

Infant female not barred of dower by precarious jointure.

However, although it has been settled that an infant may be barred of her right to dower by a settlement made on her previous to the marriage, yet it is also settled that if this provision be in its nature precarious and uncertain, then she shall not be bound by it, and she shall be at liberty to elect between the provision so made for her and her dower. As in *Caruthers v. Caruthers*,<sup>u</sup> where lands were conveyed to trustees by the intended husband and his mother to the use of the mother for life, remainder to the husband for life, remainder to the intended wife for life, as part of the jointure and provision agreed to be made for her, it was held that she was not barred of her dower and free bench by this settlement, as she would be unprovided so long as the mother of her husband lived.

Female infant not bound by settlement of her own estate previous to marriage.

However, although a female infant is bound by a settlement made previous to her marriage, where it is certain and competent, yet this must be considered as true merely as to the estate of her husband or of her own personal property, for it is decided that she cannot by any article or contract entered into during her minority, bind her real estate; but that she may, after the coverture, refuse to be bound and abide by the interest the law casts upon her; that nothing but her own act after she attains her majority, can fetter or affect her real estate. In *Blois v. Lady Hereford*,<sup>v</sup> on the marriage of Lord Hereford with the defendant, who had an estate in land, it was thought necessary to procure an act of parliament, (his Lordship and the defendant being minors,) for settling a jointure in bar of dower; provided, if she did not, when of age, settle her lands, part of her jointure to cease. So in *Clough v. Clough*,<sup>w</sup> the very point, viz. that a female infant cannot be bound by any article entered into during her minority, as to her real

Nor by any article relating to it.

<sup>t</sup> Eden's Rep. 39.; see 18 Ves. 275.  
<sup>u</sup> 4 Br. C. C. 499. by Eden.

<sup>v</sup> 2 Vern. 501.  
<sup>w</sup> 3 Woodeson's Systematic View, 453.

estate, was decided by Lord Thurlow ; and the Master of the Rolls observed, in a subsequent stage of the same cause,<sup>x</sup> that this decree of his Lordship must be satisfactory to every one.

The above case is the only one in which the point has been directly decided. There are, however, dicta of considerable weight against this position. In the first place, Lord Macclesfield, in *Cannell v. Buckle*,<sup>y</sup> puts this case, — “ Suppose a feme infant seized in fee, on a marriage with the consent of her guardians, should covenant in consideration of a settlement to convey her inheritance to her husband ; if this were done in consideration of a competent settlement, equity would execute the agreement, though no action would lie at law to recover damages.” Lord Hardwicke also said, in *Hervey v. Ashley*,<sup>z</sup> “ the reason why it may be necessary to apply for an act of Parliament upon the marriage of an infant, who has an interest in real estate is, that the rights of the infant to real estate will not be bound by any agreement made in relation to it, unless the husband should have issue by that marriage.” From this passage it is to be inferred that his Lordship, who was speaking of female infants, intended to be understood to say, that if the husband had issue by the marriage, his wife, though an infant at the time of the settlement of her real estate, would be bound by it. His Lordship further says, in the same case, referring to the above case put by Lord Macclesfield,<sup>a</sup> “ This is going a great way, as it related to the inheritance of the wife ; yet there are cases where the Court will do it, as if the lands of the wife were no more than an adequate consideration for the settlement that the husband makes, and after the marriage, the wife should die and leave issue, who would be entitled to portions provided for them by the settlement, it would in that case be very reasonable to affirm that settlement.”

If the widow shall be deprived of her jointure lands by

x 5 Ves. 510.

y 2 P. Wms. 244.

z 3 Atk. 613. Vide *Glover v.*

*Bates*, 1 Atk. 439.

a 2 P. Wms. 244.

lawful eviction, the same statute<sup>b</sup> has provided a remedy for the mischief ; for it is thereby enacted, “ that if any such woman be lawfully expelled or evicted from her said jointure or from any part thereof, without any fraud or covin, by lawful entrie or action, or by discontinuance of her husband, then every such woman shall be endowed of as much of the residue of her husband’s tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled, shall amount or extend unto.”

<sup>b</sup> 27 Hen. 8. c. 10. 10 Car. 1. c. 1. in Ireland, vol. ii. p. 21.



## CHAPTER V.

OF PROVISIONS MADE FOR THE WIFE BEFORE MARRIAGE, WHICH, THOUGH NOT CONFORMABLE TO THE 27 HEN. 8. HAVE BEEN HELD IN EQUITY TO BE A BAR OF DOWER.

A JOINTURE settled upon a woman, even of full age, would not have been a bar of dower at the common law, and the widow would, notwithstanding, be entitled to both her jointure and her dower. The statute of 27 Hen. 8. c. 10., has changed the law in this respect ; for it enacts, that, if the jointure possess certain requisites, it shall be a bar to her claim of dower, which cannot be avoided, if the jointure have been made before marriage. If it have been made during the marriage, it was no bar of dower, unless the widow accepted it. If it were deficient in any of the qualities required by this act, then the case stood as it had been at the common law, and the widow took both the jointure and the dower. The requisites for a valid jointure under this statute have been already enumerated, and the construction of its various clauses has been fully considered.<sup>a</sup> But although a jointure settled on a woman previous to her marriage, with the intention that it shall be a bar to her claim of dower, may be wanting in many of the materials required by the statute, still it may secure as sufficient a provision for her, as if it were precisely conformable, and therefore it would be unjust that a widow in such a case should take advantage of the defect, and have both jointure and dower ; and accordingly, to prevent this injustice where such a settlement has been made, a court of equity, acting on the consciences of the parties, will enforce a compliance

Jointure not possessing the requisites of the statute may be a bar of dower in equity.

<sup>a</sup> Chap. IV. Book II.

with the contract by the widow, and restrain her from suing for dower. However, although the 27 Hen. 8. will be so far restrained in its operation, equity, in the exercise of this jurisdiction, will always attend to the distinction made by the statute itself between provisions settled before and during the marriage ; for, if they be before marriage, the Court, following the act, will consider them as bars to dower ; and, if during the marriage, then the widows will not be obliged to take such provisions in lieu of their dower, but will be at liberty to accept or reject them. And the reason for making widows abide by the provisions settled on them *before* marriage, and leaving them the power of selection between a provision made during marriage and their dower, seems to be this, that as before the marriage they were *sui juris*, and capable of contracting, they shall be bound by such engagements ; but as they were incapable of contracting during their marriage, they shall be at liberty after the marriage to choose the provision most advantageous to them. It is intended to appropriate the remainder of this chapter to the consideration of the provisions made on women by their intended husbands *before* marriage, which, although not conformable to the statute, have yet been held in equity to be valid bars of dower ; and in the next chapter to treat of the same description of provisions, viz. those not conformable to this statute which have been made *during* the coverture, and of the decisions relating to such an acceptance of them by the widow as will bar her election : And it will appear from the cases to be immaterial, whether the provision intended to be a jointure, was secured by an actual settlement, or merely by articles agreeing to settle ; or if by the latter, whether they have been entered into before or during marriage, as a court of equity will decree the articles to be specifically executed, and will treat them, so far as the claim of dower is concerned, precisely in the same way as if the settlement had been actually made in the first instance.

And, first, it is settled, that any provision, however inadequate or precarious it may be, for which a woman

contracts, and which she agrees to accept in lieu of her dower, may be a valid jointure in equity. There is one exception to this rule, namely, when the woman is an infant; and in such case it is settled that, if the provision be precarious, she is not barred of her dower, but may or may not accept of the provision under the jointure, or have recourse to her dower, as she pleases. The authorities on this part of the subject shall be stated in the first instance; as, while they prove the exception, they, at the same time, establish the rule.

Any provision, however inadequate or precarious may be a bar of dower in equity.

In *Glover v. Bates*<sup>b</sup> It was provided, in articles before marriage, that the terms therein mentioned should be to the wife, in full satisfaction and recompense of all right and claim of dower, or any claim or right by common law, &c. &c. The wife lived some time after the death of her husband, who died intestate, and she accepted of the terms mentioned in the articles. Upon her death, her representative brought a bill to have her distributory share of the husband's estate, notwithstanding these articles. Lord Hardwicke said, 'The first question is, if the wife is bound by these articles? This demand of the wife, (if she had in her life demanded it,) though not properly the subject matter of a release, yet may certainly be extinguished by agreement. She was an infant at the time of entering into this agreement; therefore, at the death of the husband, she had her election, and she has made it by accepting what was designed by the articles as a satisfaction, which plainly shows her sense of the articles.' This decision of Lord Hardwicke is quite unqualified as to the nature of the interest given by the articles. His Lordship seems to say, that, whether the provision be certain or uncertain, adequate or inadequate, the infant is not bound by it. But the succeeding cases confine the proposition to instances, in which the provision in lieu of dower was uncertain and precarious. As in *Caruthers v. Caruthers*,<sup>c</sup> where Sir Joseph Jekyl held, that a settlement of an

Infant not barred of dower by articles before marriage, unless she elects after husband's death.

<sup>b</sup> 1 Atk. 439.

<sup>c</sup> 4 Br. C. C. 500.

Infant not  
barred by  
settlement  
if precari-  
ous and  
uncertain.

estate on the husband for life, remainder to another for life, remainder to the wife for life, did not bar the wife, who was an infant, of her dower, because this provision was precarious ; it being doubtful, whether the estate would ever be the wife's in possession. In this case, the estate was certain ; the enjoyment only was doubtful. But in *Smith v. Smith*<sup>d</sup> the amount of property was uncertain ; as, where by a settlement previous to marriage, it was provided that if the wife, who was an infant, should survive her husband, and there should be no issue at his decease, or she should not be enseint, then she should be entitled to receive to her own use not only all such share of his personal estate as she would be entitled to by the custom of London, as the widow of a freeman, but that she should also have all the household goods and furniture of her said husband ; and that if there was a child or children of the marriage, that then she should have the said household goods, &c. and be entitled to her share of the residue of his personal estate, according to the custom of London ; and Lord Loughborough held, that the wife was not barred of her dower by this settlement. His Lordship does not, in his judgment, advert either to the circumstance that the wife was an infant when the settlement was executed, or that the provision was precarious ; however, as these were the only grounds on which the counsel for the wife argued the case, it is probable they were the grounds of the decision. The inference from these cases is, that, if the settlement be not precarious the infant will be bound by it. Lord Thurlow held, in *Williams v. Williams*,<sup>e</sup> that an infant wife was bound by a reasonable settlement ; and, in *Williams v. Chitty*,<sup>f</sup> it was decided, that a wife was barred of dower by a settlement of stock and leasehold property made on her before marriage, while she was an infant.

But if the woman be an adult, she may contract for any species of provision, however small or uncertain, in lieu

<sup>d</sup> 5 Ves. 189.  
<sup>e</sup> 1 Br. C. C. 152.

<sup>f</sup> 3 Ves. 545.

and satisfaction of her dower, and she will be barred by it. Sir Joseph Jekyl said, "Any equitable provision which a woman takes, must be as certain a provision as her dower, not an uncertain provision, which she may never enjoy. I do not say, that if she had been an adult, she might not have bound herself; she might have taken a provision out of the personal estate, or she might have even taken a chance, in satisfaction of her dower, acting with her eyes open; but an infant is not bound by a precarious interest."<sup>g</sup>

An adult woman barred of dower in equity by any kind of provision for which she contracts.

It was at one period contended, that no species of provision would operate as a bar of dower in equity, except one which would be a good bar at law under the 27 Hen. 8.;<sup>h</sup> but now it seems that a court of equity will carry into execution any terms for a married woman, without regard to the nature of the property, as out of trust estates, leasehold, copyholds, or out of the funds, and without regard to the form of the instrument in which the contract has been entered into, and hold them to be a bar of dower, if the intention appear to have been such.

There are several cases where by provision of the husband a wife may be barred of dower, where the common law would not bar her, if it be so framed as to import a jointure, whether expressed or no; which the Court does by way of enforcing the agreement of the parties, and to prevent double satisfaction.<sup>i</sup> In *Davila v. Davila*,<sup>j</sup> Mr. Davila, on the marriage of his wife, in consideration of the intended marriage, and of 1000*l.*, covenanted, if his wife survived him, to pay her 1500*l.* in a month after his decease, in full of dower, thirds, custom of London, or otherwise, out of his real or personal estate. He afterwards died intestate, and without issue, and his wife filed a bill against his administrator, to have a moiety of his personal estate, by the statute for distribution of intestate's effects. The marriage agreement was pleaded in bar; on

If instrument intend to secure jointure, the form of it immaterial.

<sup>g</sup> 4 Br. C. C. 513.

<sup>h</sup> Vide *Drury v. Drury*, 2 Eden. 39.  
*Couch v. Stratton*, 4 Ves. 395.

<sup>i</sup> *Walker v. Walker*, 1 Ves. sen. 54.  
<sup>j</sup> 2 Vern. 274.

Covenant  
to pay a  
sum of  
money a  
bar of  
dower.

which the plaintiff contended that it did not extend to debar her from a moiety of the personal estate; or, that, if she might not have the moiety of the personal estate and the 1500*l.* she might elect *that* of the two provisions which was most beneficial. But the Lord Chancellor held, that, "by the words of the agreement she is tied down to accept the 1500*l.* in full for what she might claim for dower or thirds, or by the custom of London, or otherwise, out of the real or personal estate; words are never to be confined or restrained from their natural signification." His Lordship, therefore, allowed the plea. In this case, the instrument was in form a mere covenant, and the jointure a sum of money.

Covenant  
to pay  
widow an  
annuity for  
her life, not  
charged on  
lands, a bar  
of dower.

In *Drury v. Drury*<sup>k</sup> the husband covenanted that his heirs, executors, or administrators should pay the wife an annuity for her life in full satisfaction and bar of dower or thirds, without charging it on any particular lands, or securing it on lands generally, which was objected to on the part of the widow, as not being a good jointure at law or in equity; that it was neither a grant of lands, nor of any interest or estate out of lands; it was a mere covenant to pay an annuity, which could not in law be considered as within the intent of the act. That there was no real security for the performance of the covenant, so that the husband might, before his death, have disposed of all his real and personal estate, and left the defendant destitute of all provision. And Lord Northington held, that it was not a valid bar of dower, his Lordship saying on this part of the case, "But I cannot help taking notice of the particular settlement in question, and laying it down as a principal ground of my determination, that the interest there raised to Lady Drury is destitute of all the substantial qualities required by the statute. First, no legal estate in lands, &c. is conveyed to the lady. Secondly, no equitable lien on any real estate of the husband is created." There was an appeal to the Lords from this decree, and it was reversed.<sup>l</sup>

<sup>k</sup> 2 Eden. 39.

<sup>l</sup> *I.d.* Buckinghamshire v. Drury, 2 Eden. 60.

So although a jointure of a copyhold is no bar of dower at the common law, yet Lord Nottingham held that an agreement precedent to marriage to accept it as such makes it a bar in equity.<sup>m</sup> And in *Creswell v. Byron*,<sup>n</sup> a leasehold estate, settled before marriage, was admitted without dispute to be a bar of dower, the only question in the case being, whether the words of the settlement "in recompense and bar of dower, and for a provision for the wife," barred the wife of her thirds ; and Lord Thurlow held that they did not.

An agreement before marriage to accept of jointure out of copyhold, is a bar to dower in equity.

Settlement of leasehold estate in lieu of dower, bars it.

A bond also will be specifically carried into execution, and be held as a bar of dower, even where the intended wife was no party. As in *Estcourt v. Estcourt*,<sup>o</sup> where on a treaty of marriage the intended husband gave a bond in the penalty of 1500*l.* to his intended wife's mother, conditioned that he or his heirs would settle on trustees with all convenient speed 500*l. per annum* in land to the use of the intended wife for life, to be in full recompense and satisfaction of her dower, and after her decease to the issue of the marriage. Afterwards, during the marriage, the husband made a settlement of land in pursuance of the bond, to which the wife was a party. The husband died, and on a bill filed by the devisees under his will to establish the will and settlement, the widow by her answer submitted to the Court that she was not bound to accept of her jointure, but ought to have her election to take her dower, and insisted that she was not a party to, nor did she agree that such bond should be in full satisfaction of her dower, and though she executed the settlement, yet she was not bound thereby, being a *feme covert* at the time, and that she did it to oblige her husband. The Master of the Rolls held, that the transactions, with the circumstances accompanying them, were tantamount to an agreement, and that it was an agreement binding on the widow, although she was not a party. That being in the shape of a bond, it would have been improper to have made her a party, yet that she was

Bond a bar of dower, though wife not a party to it.

<sup>m</sup> Gladston v. Ripley, cited in Drury v. Drury, 2 Eden, 59.

<sup>n</sup> 3 Br. C. C. 362.  
<sup>o</sup> 1 Cox's Rep. 20.

to be considered as approving of it from the circumstances attending it. That the settlement made during the coverture purported to be in pursuance of the bond, and in consideration of the marriage, and that the whole was a case of an express bar of dower, to which his Honour thought the widow was not entitled.

Not necessary that the instrument should be expressed to be in bar of dower.

The words "for her livelihood and maintenance," sufficient to indicate intention to bar dower.

The above are instances where the provisions were made *expressly* in bar of dower, but it is not necessary that the intention to bar dower should be expressed; it is sufficient that the instruments should, from the terms of them, import such an intention. For instance, a bond to settle lands on the wife, for her livelihood and maintenance, if she should survive, was considered as importing an intention to bar her dower. This was the case of *Vizard v. Longden*,<sup>p</sup> where a bill was brought by the brother of the husband, who died intestate, against the widow for an account of the personal estate, and to be relieved against her claim of dower, by reason of an agreement contained in a condition of a bond entered into before marriage. She, by her answer, said, that her husband agreed to settle on her a clear annuity of 14*l. per annum*, and no particular lands were mentioned, (omitting in her answer the words "for her provision and maintenance," which were in the condition,) and prayed to have the annuity made good out of the real estate, the personal being deficient, and also to have her dower. Sir Joseph Jekyl declared in his decree, that there was not any sufficient proof of the averment, that it was in bar of dower, and decreed both the annuity and the dower. But Lord King reversed this decree, and declared she was only entitled to the 14*l. per annum*, and that it was in bar of dower. The words in this bond which were relied on as affording evidence of an intention to give the annuity in lieu of dower, were "for her livelihood and maintenance."<sup>q</sup> So in *Walker v. Walker*,<sup>r</sup> where a man, in consideration of his marriage, and to make *some provision* for his wife by deed executed before the marriage, settles upon her, if she

The word "jointure" evidence of an intention to exclude from dower.

<sup>p</sup> Cited in Lord Buckinghamshire v. Drury, 2 Eden, 68.

<sup>q</sup> Vide 3 Atk. 8. 1 Ves sen. 55.  
<sup>r</sup> 1 Ves sen. 55.



survive him, part of his real estate for her *jointure*, and in full bar of all dower of thirds, which she can be entitled to or any way claim out of any lands, tenements, messuages or hereditaments, of which he now is or ever after during the coverture shall be seised of freehold or inheritance. The husband afterwards purchased copyhold estates, of which on his death his wife got possession as her free bench; and the question was, whether the words of the settlement imported an intention to exclude the wife from it. Lord Hardwicke held, that they did, and that she was not entitled to the free bench. His Lordship said, that "if the settlement had gone no farther than the word *jointure*, he should have thought it intended to bar her, not only of what the statute would bar her, but of any other demand as a widow. His Lordship added, "What I chiefly lay stress upon is, that for her *jointure* alone would do, but not on that singly. The words, 'provision, if she survive,' mean the same as in *Vizard v. Longden*,' and the word *some* makes no difference; for it is not said 'some part.'" This settlement expresses that the *jointure* should be in bar of dower and thirds; but his Lordship declares that without any such expression the word "*jointure*" alone would be sufficient to bar her.

However, in *Charles and Others v. Andrews*,<sup>t</sup> which was prior to *Walker v. Walker*, the word "*jointure*" was not considered to be sufficient to exclude the widow from dower. In this case a bill was filed against the heir and executors of John Andrews by his creditors for an account, and to have their debts paid, and it was decreed, amongst other things, that the land should be sold for this purpose. As to the sale of the lands, this question arose, that the widow of the testator might be obliged to keep to that *jointure* which was settled on her before marriage, and relinquish her dower, or at least should choose one and relinquish the other, and that she might not have both; for though the *jointure*, which she had by her marriage

Old rule to was not allow averment, that a provision was in bar of dower, unless the instrument actually expressed it.

<sup>s</sup> Supra, p. 226.

<sup>t</sup> 9 Mod. 151.

settlement is not expressed to be in bar of her dower, yet it is the rule of this Court that she shall not have both. The Court was of opinion, that if she was a party to the settlement, and of age at the time of her marriage, and it is expressed that her jointure shall be in bar of her dower, then she shall be barred, but if it is not so expressed, it shall never be averred to be in bar of dower.

General  
provision  
for a wife  
not a bar of  
dower.

But, if there be a mere general provision for the wife, without any expression or circumstance on the face of the instrument, from which the intention to exclude her from dower can be collected, then such provision cannot operate as a bar to dower, and it would not be competent to a party to give parol evidence of an intent that it should be a bar. As in *Tinney v. Tinney*,<sup>u</sup> where a bill was brought for dower, the defendant, the heir at law, insists that the husband gave a bond in the penalty of 1000*l.* in trust, to secure to his wife 500*l.* in case she survived, and that it was intended at the time to be in lieu of dower, and that she acknowledged it to be so, and offered to read evidence of her acknowledgment. Lord Hardwicke said, "I am of opinion that parol evidence cannot be allowed in this case, being within the statute of frauds and perjuries, and that a general provision for a wife was not a bar of dower, unless expressed to be so."

Settlement  
of wife's  
fortune  
"for some  
provision"  
for her, no  
bar of  
dower.

So in *Couch v. Stratton*,<sup>v</sup> where there was an actual settlement of the intended wife's fortune before marriage, and also in another indenture of the same date, a covenant to pay a certain sum of money after his death to his wife in the event of her dying without issue had by him, although it stated that the covenant was entered into for the purpose of making "some provision" for the wife and her issue, besides the provision made by the other indenture of the same date; the husband dying intestate, it was held that the widow was entitled to her dower, there being no expression in the settlement, from which the contrary intention could be implied.

However, although the provision be general, yet it may be of such a nature, as to raise the presumption, that it was intended to be in lieu of dower. For in *Gartshore v. Chalie*,<sup>w</sup> where the husband had covenanted before marriage that his widow should, within six months after his decease, have a conveyance, payment and assignment of one full and clear moiety of all such real and personal estate as he should be seised and possessed of, or entitled to at his decease, Lord Eldon said, "Another question is, whether this is a provision in bar of dower? If it were necessary to decide that, it must be decided, as if a bill had been filed immediately upon the death, calling upon the heir to convey in fee one moiety of the real estate, and also to assign by metes and bounds one third of the other moiety; and the true question is, not upon *Vizard v. Longden*<sup>x</sup> but upon the whole, whether that was not intended to be the provision, which in every view she was intended to have as between him, her, and his heirs, executors, and administrators, and I do not think, if that was now before me, that this case might not be so taken." This opinion was formed, of course, on the ground that the deed contained in itself evidence of an intention that the provision secured by it should be in bar of dower.

Though the provision be general, yet intention that it should bar dower may be inferred from the circumstances.

Such are the cases upon the form of the instrument and the nature of the property, which have been decided to be sufficient to give good equitable jointures. It would appear that the only consideration of a court of equity is, whether the provision made, be equivalent to a legal jointure under the statute; if it be, the rule then is, to follow the law in the substance, without regard to the form, in which the object is sought to be effected. If the provision made, be equal in value to what a court of law would admit as a jointure, then it will be binding in equity. In fact, every certain provision with the consent of the wife, parents, or guardian, though not a jointure within the 27 Hen. 8. is good in equity.<sup>y</sup>

<sup>w</sup> 10 Ves. 20.

<sup>x</sup> Stated in *Ld. Buckinghamshire*

<sup>y</sup> *Ld. Buckinghamshire v. Drury*,  
2 Eden, 65.

<sup>r</sup> *Drury*, 2 Eden. 66.

## CHAPTER VI.

OF PROVISIONS FOR THE WIFE DURING THE COVERTURE, WHICH, THOUGH NOT CONFORMABLE TO THE 27 HEN. 8. WILL BE CONSIDERED SUFFICIENT TO PUT HER TO HER ELECTION.

WHERE a provision has been made for a wife before marriage, and in contemplation of it, it has been shown, that, even if it do not possess the requisites of the 27 Hen. 8., a court of equity will consider it as a bar to dower, if such an intention clearly appear on the face of the instrument. In such cases (where the provisions have been made before the marriage,) the question as to the right of election, never can arise; for if the instrument be construed to give a valid jointure, whether it be legal or equitable, the widow is bound by the contract: she can have the jointure only, and has no choice: but if the instrument be held not to have intended to give a provision in satisfaction of dower, then the wife takes her dower, and also the provision under the settlement.

If provision be made during marriage for wife in bar of dower, she may elect between it and her dower, but cannot have both. If provision during marriage be not intended in bar of

On the other hand, if the provision be made during the coverture, and be intended as a satisfaction of dower, the widow not being bound by it, whether it be conformable to the statute or not, may select which of the two she will abide by, the dower, or the provision; but she cannot have both. If the Court shall think, upon the construction of the instrument, that the provision was not intended as a compensation for her dower, then, as in the cases of provisions before marriage she will take both; so that it is only in cases of provisions made during the marriage, that the question of election can arise, and only in cases of provisions before marriage that the question whether dower

has been barred can be made : for, in the first class, if she cannot take both dower and provision, she may elect which she will take ; in the second, she has no<sup>a</sup> choice ; for if the instrument be held to be a bar of dower, she can take the provision only ; if it be not a bar, then she takes both.

dower,  
widow  
takes both.

The provisions which are made by husbands *during* coverture for the future livelihood of their widows, may be classed under two heads ; first, those which are given by instruments, which are complete so soon as they have been executed, viz. deeds, bonds, &c. &c. ; secondly, those which are given by instruments which are imperfect until the death of the husband. <sup>a</sup>

Provisions  
by hus-  
bands *during* mar-  
riage for  
their wi-  
dows made  
by deeds  
and wills.

The first class is governed exactly by the same rules of construction as those which are applied to similar instruments, when made before marriage, by which it is to be determined whether the widow in the one case is to be barred of dower, and whether in the other she is to be confined to her election. Although this rule of election may be applied to deeds as well as to wills, yet the decisions on this subject are confined to the latter only, for which Lord Redesdale accounts in this way : “ Because deeds being matter of contract, they are not to be interpreted otherwise than as the consideration which is expressed requires ; and voluntary deeds are generally prepared with greater deliberation and more knowledge of pre-existing circumstances than wills, which are often prepared with less care, and by persons uninformed of circumstances, and sometimes ignorant of the effect of the language which they use.” <sup>b</sup>

When a husband, seised of an estate of inheritance, and who had not made any provision for his wife before marriage in lieu of dower, devises to her any part of his property, the question arises, on his death, whether he intended the devise as a compensation for her dower, or intended her to have both. If it appear to have been the intention that the devise should be taken as a substitute for the dower, then a court of equity will insist on her selecting which of the

Election  
what it is.

<sup>a</sup> Vernon's case, 4 Rep. 4.

<sup>b</sup> Scho. & Lef. 449.

two provisions she will take ; and this is what is called putting the wife to her election. The principle on which equity adopts this rule is this, that as the wife has at the death of her husband an undoubted right to dower, which he, by his will, has expressed his wish that she should exchange for another and different provision although she cannot be forced to surrender this right, yet she will not be suffered to take both provisions, but will be put to the alternative of abiding by her common law right, namely, her dower, or of taking the provision which her husband has allotted to her. The wife will not be allowed to accept of a favour from her husband under his will, and at the same time to disappoint his intention and defeat his will by availing herself of a right which he wished her to give up ; and this is the foundation, as Lord Redesdale observes, of the law of election.<sup>c</sup>

What terms in a will indicate an intent of the husband that his widow shall be put to her election.

Such is the nature of election. The next subject for consideration is, what are the terms which have been held to indicate an intention in the husband that the wife shall be put to her election ; and what terms have been considered insufficient for this purpose ? In the first place, it is clear, that if the testator expresses the intention that the gift shall be in lieu of dower, the wife cannot have both, but is put to her election. And even if, after making his will, the husband sell part of that which he had bequeathed as a satisfaction of dower, still she must elect. As in *Axtel v. Axtel*,<sup>d</sup> where the husband devised three tenements, and one called Cox's tenement, to his wife in satisfaction of her dower, with election to her to take one or the other,—the dower or the legacy. Afterwards he sold Cox's tenement, and died without new publishing the will. The wife insists to have satisfaction for Cox's tenement, because her husband gave her that with the rest as in satisfaction of her dower. And the plaintiff cannot bar her of her dower by the will. The Chancellor said, she must take the will as it was at the time of the death of her

<sup>c</sup> 2 Schol. & Lef. 449.

<sup>d</sup> 2 Cas. in Chan. 24.

husband, for, till then, it is no will ; let her choose one or the other, she may not have both ; and decreed accordingly. *Lawrence v. Lawrence*<sup>e</sup> is the first case upon the subject. The facts were, that Mr. Lawrence devised some legacies out of his personal estate to his wife, and also devised to her part of his real estate during her widowhood, and devised the residue of his estate to trustees for twenty-one years for payment of debts and legacies. The remainder of the whole estate he devised to the plaintiff (not his son, but a remote relation) for life, remainder to his first and other sons in tail. Lord Chancellor Somers was of opinion, that although what was given to the wife was not declared to be in lieu and satisfaction of dower ; and, although no estate for life was devised, but only during widowhood, yet that in equity it ought to be taken, that what was so devised was intended to be in lieu and satisfaction of dower, and that it might be plainly collected and intended from the will that it was so intended, because he thereby devised all other his real estate to other uses ; and a collateral satisfaction may be a good bar to dower in equity, though not pleadable at law ; and his Lordship decreed, that she must either take her dower and waive the devise, or accept the devise and waive the dower. But the Lord Keeper Wright reversed this decree, conceiving there was nothing in the testator's will that showed an intention to bar defendant of her dower ; and this reversal was affirmed by Lord Cowper, and afterwards on an appeal to the House of Lords.<sup>f</sup>

This case was afterwards cited by Lord Hardwicke, as an authority for the position,<sup>g</sup> that where the husband had devised an estate to his wife *larger* than her dower, still she would be entitled to both.<sup>h</sup> And in *French v. Davies*<sup>h</sup> the Master of the Rolls says, that this case of *Lawrence v. Lawrence* proves, that a gift by a husband to the wife of a larger

<sup>e</sup> 2 Vern. 365. 1 Eq. Ca. Ab. Lawrence v. Lawrence, 2 Vern. 218. 2 Eq. Ca. Ab. 386. 366.

<sup>f</sup> See Mr. Rathby's note to g 2 Atk. 427.

<sup>h</sup> 2 Ves. jun. 578.

amount than the dower is no bar of dower. But Freeman is the only reporter of *Lawrence v. Lawrence*, who states the devise to the wife to have been "altogether of better value than her dower."<sup>i</sup>

Wife not barred by provision of greater value than the dower, unless expressed to be in satisfaction of it.

*Lemon v. Lemon*<sup>j</sup> is a decision to the same effect, on facts nearly similar. J. Lemon devised lands to his wife for her life, and devised other lands to the plaintiff, his brother, and his heirs. The defendant, wife of the testator, enters into the lands devised to her, which were of more value than her dower, but not devised to her expressly in lieu and satisfaction of dower, and afterwards brings dower against the devisee of the other lands, and recovers dower against him, with costs. He brings his bill in this Court to be relieved against the judgment, the lands devised to her by her husband being of greater value, and she being in possession of them. *Lawrence v. Lawrence* was cited for the defendant to prove that the wife shall have dower, notwithstanding a devise to her for life of lands by her husband, unless declared to be in satisfaction of dower. Parker, Chancellor, said, "This point is determined already by the House of Lords, that there is no relief in this case in equity; therefore the bill must be dismissed."

Devise of lands, not expressed to be in lieu of dower, no bar.

So in *Hitchin v. Hitchin*<sup>k</sup> the husband devised several lands to his wife, but did not mention it to be in satisfaction of her dower, and devised the residue of his lands to his executors, till his debts should be paid. The wife brought her writ of dower, and recovered it. The heir filed a bill to be relieved against this recovery, on the ground that the devise must be in satisfaction of dower. But the Lord Keeper held, that the devise was not to be looked on as any recompense or bar of dower, but a voluntary gift.

Bequest of a personal legacy, with a remainder.

In *Inclendon and Others v. Northcote*<sup>l</sup> a personal legacy only was given to Lady Northcote, without any present immediate interest in her husband's real estate, but with

<sup>i</sup> 2 Freem. 234.

<sup>j</sup> 8 Vin. 366. 2 Eq. Ab. 353.

<sup>k</sup> Proc. Chan. 133. 2 Vern. 403.

<sup>l</sup> 3 Atk. 430.



a remainder to her for life, in default of issue male and female by her; and Lord Hardwicke held, on the authority of *Lawrence v. Lawrence*,<sup>m</sup> which his Lordship considered to be a case in point, that Lady Northcote was not excluded from her dower out of the same lands.

to the wife in his real estate, not expressed to be a satisfaction of dower, no bar.

In *Wride v. Clark*,<sup>n</sup> also, where the question was, whether the wife could take an estate devised to her by her husband, and claim her dower besides? Sir Thomas Sewell said, "Unless by express words it appears intended to bar dower, she shall not be put to her election:" a decision in which his Honour was governed principally by *Lawrence v. Lawrence*,<sup>o</sup> and *Lemon v. Lemon*.<sup>p</sup>

Widow not put to her election by a devise to her by her husband, without express words.

*Brown v. Parry*,<sup>q</sup> decided by Lord Thurlow, is to the same effect. The testator died seised of lands, of which the defendant, his widow, was dowable. By his will he devised to his wife some particular estates for life, and also bequeathed to her specific parts of his personal estate, but did not add in bar of dower. The question was, whether, by accepting the devise and bequest under her husband's will, she had not barred her claim of dower. The Lord Chancellor was clear, she had not; for it was not her husband, but the law, that gave her dower, and what her husband gave her was an addition.

Express words necessary to put widow to her election.

In the above cases it seems to have been considered that the devises in themselves were not sufficient to put the widows to their election without words expressive of such an intention. However, express words are not always necessary to exclude the wife from dower, as the intention may be collected from the circumstances of the will, which was decided in *Birmingham v. Kirwan*.<sup>r</sup> In this case the question, whether a widow, to whom her husband had devised a part of the lands liable to dower, could claim under the will, and have her dower also, underwent a very minute discussion. The facts were, that Nicholas Birmingham,

The intention to put widow to her election, may be inferred from the circumstances, without express words.

<sup>m</sup> 2 Vern. 365.

<sup>n</sup> Cited by the Master of the Rolls in *French v. Davies*, 2 Ves. jun. 580.

<sup>o</sup> Supra.

<sup>p</sup> Supra.

<sup>q</sup> 2 Dick. 685.

<sup>r</sup> 2 Scho. & Lef. 444.

being seised of estates in fee simple, devised "his demesne, containing about 170 acres, together with his house, offices, and gardens, to trustees in trust, to permit and suffer his beloved wife to hold and enjoy the same during her natural life, she paying yearly every year during her life 13s for every acre contained in his said demesne, exclusive of bog, and not to set to any person, save such person as shall be in possession of the remainder." And as to all the residue of the said lands, he devised them to John Birmingham for life, remainder to his son Nicholas Birmingham, his heirs and assigns. The principal point argued was, whether the widow of the testator was entitled both to dower, and also to the provision made for her by the will. For the plaintiff it was contended, that the widow must elect to take either under the will, or under paramount title to dower. That the testator devised the mansion house and demesne to her, intending it as a provision for her, and not having it in contemplation that she was entitled to any other. That if she were to take both provisions, it would contravene the intention of the testator, though not expressed in direct terms. On the other side, it was contended for the widow, that the testator had not expressly said that the devise of the house and demesne should be in lieu and satisfaction of dower, and that there was no circumstance in the will from which an intention to exclude her from dower could be inferred; and that there was nothing repugnant or inconsistent in the two claims. Lord Redesdale, Chancellor, held it to be clear, that the assertion of a right of dower, as to the house and demesne, would be inconsistent with the dispositions of the house and demesne, contained in the will; and therefore that Mrs. Burke, the widow, cannot have both. That as to the question, whether the implication extends to the rest of the estate; his Lordship said, "he could not, on the whole of the case, think the testator had sufficiently manifested an intent that his beneficial interest in the house and demesne, given upon a reserved rent, and under certain conditions, should be considered as a bar of dower out of the rest of the estate; the will might be

perfectly executed as to all other purposes, without injury to the claim of dower, with respect to the rest of the estate." His Lordship took occasion, in delivering his judgment, to observe, that the argument for the widow seemed to go so far as to assert, that no bequest could be deemed in bar of dower, without express words, and that the widow ought not, in any case, without express words of exclusion, to be put to her election. His Lordship thought, however, that this position could not be maintained. And he added, that the rule to be collected from all the cases was this, "that as the right of dower is in itself a clear legal right, an intent to exclude that right by voluntary gift must be demonstrated either by express words, or by clear and manifest implication. If there be any thing ambiguous or doubtful, if the Court cannot say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower cannot be supported, and to make a case of election, that is necessary, for a gift is to be taken as pure, until a condition appear." The decree was, "that the disposition made in favour of the defendant, in respect of the house and demesne in the pleadings mentioned, is inconsistent with her demand of dower thereout. And that therefore she must elect to receive her dower out of the said house and demesne, or accept such disposition in satisfaction thereof; but that the disposition in her favour contained in the testator's will cannot affect her claim of dower out of the rest of the testator's estate.

An intent to exclude from dower by a voluntary gift, must be demonstrated either by express words or by clear and manifest intention.

The next case on this subject is that of *Lord Dorchester v. Lord Effingham*,<sup>s</sup> the facts of which bear a strong resemblance to those in *Birmingham v. Kirwan*.<sup>t</sup> In this case, Lord Dorchester being seised of two estates in fee, one called Up Nately, containing about thirty-three acres, and the other consisting of a mansion called Stubbings, and the lands usually held therewith, containing about fifty-four acres; and also a farm house and lands in Besham, containing about two hundred and twenty-nine acres, by his

<sup>s</sup> Cooper, 319.

<sup>t</sup> Supra.

will desired that Lady Dorchester, his wife, should have Stubbings house during her life, with the ground then in hand, about fifty-three acres, together with all the stock thereon alive and dead, and all the household furniture, linen, plate, clothes, books, &c. &c. And his Lordship further directed that all his landed estate should be attached to his title as closely as possible.

The Master, in his report, made in pursuance of a decree directing an inquiry, stated it to be his opinion, that as Lady Dorchester had no jointure settled on her in lieu of dower, she was entitled to dower not only out of thirty-three acres in Up Nately, but also out of the mansion-house, and two hundred and eighty-three acres attached to it, if she would forego the benefit of the devise of the mansion-house and the fifty-four acres. To this report an exception was taken by Lady Dorchester, for that the Master ought to have stated, so far as regards the Stubbings estate, that she was entitled to dower out of that estate, save and except as to the mansion-house and fifty-four acres devised to her for life.

It was contended for Lady Dorchester, that the devise of part of the estate could not have the effect of excluding her from dower out of the rest ; and that the two claims were not inconsistent, for which *Birmingham v. Kirwan*<sup>u</sup> was cited. On the other side, it was argued that the testator must have intended that his wife should take only a certain interest in the lands from this passage in his will, "that all his landed estates should be attached to his title as closely as possible." It was also contended, that as the gift was of a part of one entire estate, it must have been the intention to have excluded her from the remainder of that estate. The Vice-Chancellor, Sir Thomas Plumer, stated it to be his opinion, that the will did not contain any express words of exclusion, and that such intention could not be collected by inference. As to the argument arising from the gift being out of the same estate out of which

Widow not  
put to her  
election by

<sup>u</sup> Supra.

dower was sought, his Honour asked, "Why should the testator be supposed desirous of excluding his wife from dower from any part of the Stubbings estate, and at the same time to have left the thirty-three acres open to her right of dower, which the plaintiffs admitted she was entitled to?" And as to the words in the will about attaching the testator's land to his title as closely as possible, his Honour said, "they create no inconsistency with the claim of dower. That claim may postpone or abridge such object in the testator, but it is not absolutely inconsistent and incompatible with it, and both object and claim may stand together." These cases prove that a devise of a part of the estate liable to dower, or of that and personal property by a husband to his wife entitled to dower, where no reference or allusion is made to the dower, does not bar her from it. There was no circumstance in any of the above mentioned wills from which it could be inferred that the testator had an intention of excluding his wife from her dower. But if there be any circumstance in the will, or any thing in the nature of the devise, (independent of an express declaration on the subject,) from which an inconsistency, with an intention that the wife should have her dower, would appear, this has been considered a ground for rejecting the wife's claim to both the dower and the devise, and for putting her to her election. The difficulty is, however, to ascertain what the fact or circumstance is, which would be deemed inconsistent with the intent that the wife should have both. For that circumstance which has appeared to some judges to be clearly indicative of an intention that the wife should not have her dower, has been relied on by others as decisive of a contrary design. For instance, the bequest of annuity to the wife, out of the estate out of which dower was demanded, has been held by some judges to be utterly inconsistent with the claim to dower, whilst others have held it to be no bar. The first case, in which the bequest of an annuity out of the estate liable to dower, was held to be inconsistent with the claim to dower, was *Arnold v. Kemp-*

a gift out of the same estate, out of which dower is sought without express words or manifest intention to be collected from the circumstances.

Bequest of leasehold interests and annuity out of the lands, subject to dower, puts widow to her election.

*stead.*<sup>v</sup> In this case the husband gave to his wife two *leasehold* houses for life. and also an annuity for life out of the rents and profits of his freehold estates. After his death the wife brought a writ of dower, and took possession of the leaseholds; and a bill was thereupon filed against her for an account and injunction, and that she might elect either to take under the will or abide by her dower. She insisted on both in her answer. Lord Northington decreed that she must elect; that it was the manifest intention of the testator to give this annuity in satisfaction of dower; that he had disposed of all his freehold estates subject to the annuity; so that his widow would have no more out of the estates than the annuity.

Bequest of annuity to widow out of estate, subject to dower, with clause of entry and distress, puts her to her election.

The next case, in which a similar decision was had, is *Villareal v. Lord Galway*.<sup>w</sup> The words of the will in this case were; "I give and devise to my dear wife, one annuity or clear yearly sum of 200*l.*, to be paid her by two equal half-yearly payments, which annuity I give her during her natural life, and subject to the payment of said yearly annuity." He gave all and every his messuages, cottages, &c. &c., and also his personal estate, to trustees in trust for the use of his daughter for life, remainder to the heirs of the body of his daughter. A power of entry and distress was also given to the wife, if her annuity should be in arrear. One of the questions on this will was, whether Mrs. Villareal is to take this annuity in satisfaction of dower out of her husband's real estate? Lord Camden was of opinion that the annuity operated as a satisfaction of her dower, because the claim of dower, in the first place, disappoints the will, and, in the second, is inconsistent with it.

Bequest to widow of personalty, and of an annuity out of estate,

The next case of the bequest of an annuity by a husband to a wife entitled to dower, is *Jones v. Collier*,<sup>x</sup> where the husband devised to his wife his dwelling-house in Chelsea, together with the household goods and furniture for her

<sup>v</sup> 2 Eden, C. C. 236.

<sup>w</sup> Ambl. 692. 1 Br. C. C.

292 n.

<sup>x</sup> Amb. 730.

life, and charged all his freehold estate at Chelsea, with an annuity of 40*l.* payable quarterly to his wife, with power of distress in case of non-payment; and after charging his estate with the payment of another annuity of 40*l.* to his nephew, he devised the remainder to his niece, her heirs and assigns if she attained the age of twenty-one years. A bill was filed by the niece for an account, and the widow claimed her dower and annuity. It appeared by the Master's report, that the widow's dower was about 10*l.* ~~per annum~~ more than the annuity. Sir Thomas Sewell, Master of the Rolls, decreed the widow to make her election.

subject to dower, with clause of distress, puts her to her election.

*Wake v. Wake*<sup>y</sup> is the next instance where a bequest to the wife of an annuity out of the estate liable to dower, was held to be intended as a satisfaction of her dower and where the widow was accordingly put to her election. In this case the testator by his will gave freehold estates to the defendant, his son, subject to an annuity of 35*l.* payable quarterly to the plaintiff, his widow, and also gave her a legacy of 100*l.* She accepted the annuity for nearly four years, and then filed her bill, praying an account of the rents and profits of the real estates, and that she might be paid her dower thereout. The defendants insisted, on the other hand, that the annuity and legacy ought to be taken by the widow in satisfaction of her dower, and that by accepting thereof, she had made her election. In this case, the estate liable to dower was 240*l.* ~~per annum~~, and the dower of course 80*l.* It was argued for the widow, on the ground of disproportion between dower and annuity, and that therefore she ought to have both. But Mr. Justice Buller, sitting for the Chancellor, thought, that upon the authority of the cases, this was a case of election.

Bequest to a widow of money and an annuity out of lands, subject to dower, puts her to her election

Acceptance of annuity for three years not an election.

These are the authorities in favour of putting the widow to her election, when her husband has bequeathed her an annuity out of the lands subject to dower. There are however other decisions by judges of high character, in which the opposite doctrine has been held. *Pitts v. Sowden*,<sup>z</sup>

Bequest of annuity out of lands subject to dower, is not a satisfaction of it.

<sup>y</sup> 3 Br. C. C. 255. 1 Ves. jun. 335.

<sup>z</sup> Stated in a note to *Pearson v. Pearson*, 1 Br. C. C. 291. by Eden.

decided by Lord Hardwicke, is the first of this series, and was prior to *Arnold v. Kempstead*.<sup>a</sup> There the devise was to the wife of an annuity of 50*l.* payable out of his copyhold and freehold estates, with clause of entry and distress, to be made good out of his personal estate, and subject to the annuity: he gave his freehold messuages to his three children. His Lordship determined the widow to be entitled to both dower and annuity. So in *Pearson v. Pearson*,<sup>b</sup> where the testator gave by his will ten acres of land to his son, subject to a rent-charge of 10*l.* *per annum* to his wife for life, and 5*l.* *per annum* to his brother. The widow filed a bill for the annuity and the dower, and the only question was, whether the rent-charge to the wife was a bar of her dower, it not being so expressed in the will. Lord Loughborough said, "The law is perfectly settled, and very plain. The gift of an annuity to the wife may be a bar of dower, or may not, according to the language of the will. In this case, if the value of the lands should not be sufficient to satisfy the two annuities and the dower, it would prove it was intended to be in bar, otherwise there is nothing in the will to show such intention, and there must be such an intent to make it a bar to dower." The cause stood over in order to inquire into the value of the land, plaintiff's counsel agreeing, that if it should not be sufficient to answer the annuities and the dower, the widow should relinquish her claim. Here then is a rule by which the intention of the testator may be discovered, if the will be silent, as to the widow's right to both annuity and dower, where the annuity is charged upon the land liable to dower.

If lands charged with the annuity be not sufficient to answer it and the dower, evidence of intent that widow should have the annuity only.

Annuity charged on real and personal estate, not a satisfaction of dower.

In *Foster v. Cook*<sup>c</sup> the testator gave all his real and personal estate whatsoever to trustees, upon trust to pay his wife an annuity of 50*l.* a-year during widowhood, and in case she should marry again, then to pay her an annuity of 30*l.* only. It was contended, that the widow could not take

<sup>a</sup> 2 Eden, 236.

<sup>b</sup> 1 Br. C. C. 291. by Eden.

<sup>c</sup> 3 Br. C. C. 347. by Eden.



both the annuity and her dower. That the testator could not have had such an intention, as the trustees were to have possession of the whole estate, and out of it were to pay her the annuity, which is inconsistent with her having the third part as a dower. That her claim would put the trustees out of possession. But Lord Thurlow said, "The wife has a charge upon the estate paramount to the will: she has an absolute right to the third part: it is not his to deprive her of it. But here it is to be gathered from circumstances, that she is not to have it; and because he gives all his property to the trustees, I am to gather from his having given all he has, that he has given that which he had not. So far from a declaration plain, I have nothing even to lead me to think he meant to deprive her of dower. She must therefore have her dower."

So in *Middleton v. Cater*,<sup>d</sup> where the husband bequeathed all his estates and effects, real and personal, in trust, to lay out on mortgages, and to pay his wife 80*l.* *per annum*, and for other purposes, and after her death to make sale thereof; and he gave all the residue to a charity: Lord Thurlow decreed the widow to be entitled to her dower, and to have the annuity out of the two funds proportionably.

Annuity out of real and personal estate does not put widow to her election.

And even where the husband directed the estate liable to dower to be sold, and out of the produce of the sale of it, and of personal estates, bequeathed his widow an annuity, it was held not to put her to her election. This was the case of *French v. Davies*<sup>e</sup> where the testator Davies bequeathed his real and personal estate to trustees to be sold, and out of the produce to pay, amongst other sums, an annuity to his wife. The freehold estate was sold, discharged of dower, with the consent of the widow; and on a bill filed to have the will established, and the trusts performed, the principal question was, Whether the widow should be put to her election to take the benefits given to her by the will, or her dower out of the freehold estate? It was contended for the plaintiffs, that it was impossible to suppose

Annuity out of the produce of personal estate and of the estate liable to dower, does not put widow to her election.

<sup>d</sup> 4 Br. C. C. 409.

<sup>e</sup> 2 Ves. jun. 572.

the testator, when he directed a sale, meant it to be sold subject to dower ; and that it was not likely he could intend she should insist upon that, which is just so much a diminution of the estate directed to be sold. But the Master of the Rolls, Lord Alvanly, was of opinion, that there was not enough in this will to put the widow to her election. His Honour said, " It is not enough to contend, that he did not intend to exclude her from dower, for she does not want his intention in her favour ; but it is necessary to prove he intended to exclude her. If they do not make that out, she has a right to take dower, and to claim all the other benefits ; for they cannot prove he meant to impose a condition, and to make her give up the dower ; and if that is not proved by fair inference upon the whole will, her right must prevail."

Bequest to a widow of an annuity to be paid by his executors out of produce of real and personal estate, does not put her to her election.

*Greatorax v. Cary*<sup>f</sup> is pretty nearly to the same effect. Samuel Greatorax bequeathed to his wife 150*l. per annum*, during her widowhood, which sum he desired his executors to pay out of the produce of his real and personal estate, which personal estate he desired might be placed out at interest to assist his real estate in the payment of such annuity. The widow filed a bill claiming the annuity under the will, and also her dower and free bench. The report ascertained the rental of the testator's freehold lands to be 100*l. per annum*, and that by the custom of the manors, of which the copyhold estates were held, there was no free bench. Lord Alvanly said, " I do not see how this case can be distinguished from *Forster v Cook*.<sup>g</sup> The estate in that case was given to trustees upon trust to pay the annuity to the wife ; in this it is given directly to her. The question in all these cases is, whether the testator meant to give away his wife's dower, which he could not do directly ? For that it must be seen clearly, that he meant to dispose so, that, if she should claim dower, it would disappoint the will. It must appear that there is a repugnancy. Upon the whole, I am clearly of opinion that the plaintiff is

<sup>f</sup> 6 Ves. 615.

<sup>g</sup> *Supra*.

entitled to dower." It is to be observed, in the above case, that the lands subject to dower produced only 100*l.* *per annum*, while the annuity amounted to 150*l.*; so that it would seem no inference can be drawn against the widow's right to the annuity and her dower, from the circumstance that the annuity exceeded in amount the produce of the estate liable to dower.

But, if the testator's disposition of his property would be defeated by the widow taking the provision under the will and her dower also, she will be put to her election. As in *Chambers v. Storil*,<sup>h</sup> where the testator bequeathed to his wife and his two children all his estates whatsoever, to be equally divided amongst them, whether real or personal, on a bill by the children that the widow might be put to her election as to her right to dower, and the will be established, Sir William Grant said, "As to her right to dower, whether she took under the will an absolute interest or for life only, it is a case of election, the claim of dower being directly inconsistent with the disposition of the will. The testator directing all his real and personal estate to be equally divided, the same equality is intended to take place in the division of the real as of the personal estate, which cannot be, if the first widow takes out of it her dower, and then a third of the two remaining thirds." In *Dickson v. Robinson*,<sup>i</sup> also, where the facts of the case were nearly similar, Sir Thomas Plumer decided in conformity to *Chambers v. Storil*, saying he could not distinguish the two cases.

If the widow's taking the provision under the will, and her dower also, would defeat the testator's disposition of his property, she will be put to her election.

And in *Boynton v. Boynton*,<sup>j</sup> where the husband bequeathed to his wife 1000*l.* *per annum*, charged on his real estates in lieu of dower; but in case she should marry, then only 100*l.* *per annum*, "the said annuity of 100*l.* to be in full for every benefit and advantage which I mean shall arise out of any my real or personal estates, in case she shall happen to marry again." The widow did afterwards marry, and claimed the annuity of 100*l.* and her dower. But Lord Thurlow held that she must elect. His

<sup>h</sup> 2 Ves. & B. 222.  
<sup>i</sup> 1 Jac. C. C. 503.

<sup>j</sup> 1 Br. C. C. 445.

Lordship said, that by these expressions he rather thought the testator intended this estate should be quite clear of her. That the natural construction of the words seemed to be, that if she married again, she should have only 100*l.* *per annum*. That in this the testator's intention was defeated, but that she could not take her dower and the annuity.

Annuity to widow not out of lands liable to dower, does not put her to her election.

In all the above cases, the provision for the widow was made, either out of the property liable to the claim of dower, or out of a mixed fund of real and personal property. But even where the provision for the widow was in the shape of an annuity not arising from the lands liable to dower, but from a different fund, and the lands were devised to another person, it has been held that she is not put to her election. As in *Strahan v. Sutton*,<sup>j</sup> where Matthew Strahan, by his will, gave to his wife twenty guineas for her immediate support, and also an annuity of 30*l.* for her life, provided she should so long continue his widow; and he directed the remainder of his personal estate to be laid out in the funds for purposes therein specified. He also devised his freehold estate to his son; and he directed, that the said freehold should not, during the minority of his son, be let to or occupied by particular persons, whom he specified. On a bill filed by the infant son, the question was, Whether the widow could claim the provision given to her by the will and her dower, or must elect? The Master of the Rolls held, that the widow was entitled to the annuity and her dower, although the estate liable to dower was devised to another person, namely her son, as it had been clearly decided, that a gift of an estate, out of which the widow is dowable, does not prevent her from taking any other estate the testator has thought fit to give her."

Bequest of residue of personal property to widow, will not put her

As neither an annuity charged on the lands liable to dower, nor on them and personal property mixed together, nor on personalty alone, will be sufficient to put the widow to her election, neither will a bequest of a residue of per-

sonal estate by a husband to his wife generally without taking notice of her right to dower, put her to her election.

to her election.

As in *Ayres v. Willis*,<sup>k</sup> where such a bequest was insisted upon to be an implication to bar the wife of dower: but Lord Hardwicke held, that she was entitled to both; saying, that "here, by the claim of dower, the wife does not break in on the will, and this is the stronger, as it is only a residue which accidental benefit he might intend she should have as well as dower." Nor will a bequest by the husband to his wife of an ascertained sum of money put her to her election. As in *Thompson v. Nelson*,<sup>l</sup> where the husband devised "all his real estates whatever, and all his goods, chattels, and personal estate, to trustees, upon trust, in the first place, to pay to his wife the sum of 480*l.*, and after payment thereof, to pay and apply the residue amongst his three children." The question was, Whether this bequest of 480*l.* being made payable out of all the testator's real estates, should in equity, be a bar of dower. And the Master of the Rolls said, that, though the older cases laid great stress on the whole real estate being disposed of by the testator, yet the inclination of the later cases was not so strong against the widow. They expected some clearer indication of the testator's intention to exclude her from her right to dower, or that it should appear that if the widow took both the dower and the provision under the will, some other part of the testator's disposition of his property would be defeated; and his Honour was therefore of opinion, that, in this case, the widow was entitled to the 480*l.* and also to her dower.

A bequest of a sum of money payable out of all the estate real and personal of the husband, will not put the widow to her election.

The power of accepting or rejecting a jointure made on her during the marriage is given to the widow, by the 27 Hen. 8. c. 10. sect. 8, by which it is enacted, "that if any wife shall have any manors, &c. unto her given or assured after marriage for term of her life, &c.; that then such wife, over-living her husband, shall and may, at her liberty, after the death of her said husband, refuse to have

<sup>k</sup> 1 Ves. sen. 230.

<sup>l</sup> 1 Cox's C. C. 447.

and take the lands, &c. and to have, demand, and take her dower, any thing in this act to the contrary notwithstanding." And as a court of equity gives the widow the same liberty of electing between any provision made for her after marriage, either by deed or will, in lieu of dower, and her dower, it becomes necessary to inquire, what acts have been considered as an acceptance, and what acts as a refusal of such substituted allowances. And, first, it has been held, that a mere acceptance of the jointure by word in *pais*, will be sufficient to bar the widow of her subsequent claim of dower. So if she enter on the jointure lands, and agree thereto, the same is a good bar of dower.<sup>m</sup>

Widow  
barred of  
her dower,  
by accept-  
ance of  
jointure by  
word in  
*pais*.

By entry  
on the join-  
ture lands.

Wife bar-  
red of  
jointure by  
refusal  
in *pais*.

Widow  
barred of  
jointure  
made after  
marriage,  
by a reco-  
very in  
dower.

As the widow is barred of her dower by having accepted a jointure settled on her during the marriage, so she is barred of her jointure, or of any other provision made for her during the marriage, by having refused such provision. And, first, the widow may refuse her jointure by word in *pais*; as it was unanimously agreed by all the Judges and Barons of the Exchequer, that by force of the 8th sect. of the 27 Hen. 8. c. 10. the wife might refuse her jointure in *pais*, and be endowed by consent in *pais*, or by writ of dower.<sup>n</sup> So if the widow sue for her dower, it is such a refusal of the jointure as precludes her from afterwards having recourse to the jointure. As in *Goating v. Warburton*,<sup>o</sup> where the testator devised that his daughter should pay, after her age of nineteen years, to his wife, 12*l.* per annum, in recompense of her dower: and, if she failed in payment, that his wife should have the land for her life. The wife, before her daughter's arrival at the age of nineteen, brought a writ of dower, and recovered a third part, and after the daughter arrived at nineteen years of age, entered for non-payment of the 12*l.* And the question in an ejectment was, whether her entry was lawful? And it was adjudged, that, having recovered a third part in dower, she shall not have the rent by the will; and that it was against the intent

<sup>m</sup> Baron and Feme, 166.  
<sup>n</sup> 3 Coke, 27.

<sup>o</sup> Cro. Eliz. 128.

of the will, that she should have both, and that the acceptance of one is a waiver of the other. And on a writ of error, this judgment was affirmed. It has been also held that an acceptance of dower by deed bars the widow from claiming the provision devised in lieu of it.<sup>p</sup> Such are the acts by which the widow will be deemed to have accepted or refused the provision made for her during marriage in lieu of dower.

Widow barred of jointure made after marriage, by acceptance of dower by deed.

But, although the widow is bound to elect between a provision made for her after marriage and her dower, where the provision has been made clearly with the intention that it shall be in lieu of dower; yet, though she should have so far elected as to have received, for a long period of time, the maintenance given to her by her husband as a satisfaction for her dower, still, if she have acted so in ignorance of the extent of her rights, or under an erroneous impression as to the value of the substituted provision, it has been decided that she will be at liberty to relinquish her first choice to have recourse to her dower. In *Wake v. Wake*,<sup>q</sup> where the widow received a legacy and also an annuity under the will of her husband for three years, and then filed her bill, claiming these interests, and also her dower. Justice Buller held it to be a case of election, but that the widow was not bound by her receipt of the legacy and the annuity for three years, but might still choose her dower, because it did not appear that he was acquainted with the circumstances of her husband's real estate and of her own rights. She was obliged, however, to account for the legacy, and for what she had received of the annuity. So in *Kidney v. Coussmaker*<sup>r</sup>, where the widow had elected to take certain benefits devised to her by her husband in lieu of dower, and had even released her dower and thirds to the executors, but afterwards finding that claims were made by her husband's creditors upon the substituted provision, she abandoned it, and claimed her dower. And Sir William

Widow not bound by her election if made in ignorance of her rights, or under a mistaken impression.

<sup>p</sup> Bar & Feme, 166.

<sup>r</sup> 12 Ves. 136.

<sup>q</sup> 1 Ves. jun. 335. 3 Br. C. C. 255. by Eden.

Widow bound by her election, under her husband's will, if she were apprised of the value of the other fund.

Grant held, that as she had made her election under a mistaken impression that the creditors were not to make any claim on the estates devised to her, she was not bound by the election she had made. And the widow will not only not be bound by an election made under such circumstances, but it would seem that she would have a right to postpone her election, until an account had been taken under the authority of the Court of the value of her dower, and of the provision her husband had substituted in lieu of it, for the purpose of enabling her to form a more correct judgment upon the subject.\* But if the widow be fully aware of the respective values of the two funds, either of which she has a right to elect, and if she elect one of them, and take possession of it, she shall not afterwards abandon it and claim the other. As in *Butricke v. Broadhurst*,<sup>1</sup> where the widow having been five years in possession of rents and profits devised to her for life under her husband's will, and then filed her bill, claiming to elect an interest in a trust fund under her marriage settlement, instead of the estate under the will. Lord Thurlow dismissed the bill: his Lordship said, "That if she had filed a bill, stating that she did not know the state of the fund, and desiring to have the debts and legacies paid, and the property cleared, that she might elect to advantage, she might have done so. But having taken possession under the will, and the estate being a free fund from the beginning, his Lordship said, he could not think of a principle, on which the Court could say she was competent to elect. But he wished it to be understood, that it turned on the particular circumstance, that the bill was filed without any suggestion, that the real or personal estate was in such a situation as to render it doubtful what the result would be. That she consequently had laid no ground that entitled her to elect after enjoyment for five years."

<sup>s</sup> Newman v. Newman, 1 Br. C. C. 186. Boynton v. Boynton, 1 Br. C. C. 445.

<sup>t</sup> 1 Br. C. C. 88. 1 Ves. jun. 171.



## BOOK III.

### CHAPTER I.

#### OF PROPERTY TO THE SEPARATE USE OF MARRIED WOMEN.

ALTHOUGH the common law will not allow a married woman to possess personal property independently of her husband,<sup>a</sup> yet there may be a trust for her sole benefit, which a court of equity will take care to see strictly performed. Property of any description may be limited to the use of a married woman; but whether that use shall be separate or not, and whether her husband shall be barred of the interest which the law gives to him in the possession of his wife, depends altogether on the intention of the donor. When that intention is once ascertained to be, that the use is for the wife alone, and not for her husband, equity will give effect to it without any regard to the legal maxim, that "the husband is the head of the wife, and, therefore, all that she has belongs to him."<sup>b</sup>

At the common law, a married woman incapable of possessing personal property.

Equity will support a gift to the separate use of a married woman.

An estate of this kind, viz. to the separate use of a married woman, may be created either before or during the marriage. Before marriage it may be created by the woman herself of her own property, or by the intended husband, or by a stranger. During the marriage it may be created by the husband,<sup>c</sup> or by a stranger, but not by the wife; as she would then be rendered incapable of disposing of any

An estate to a separate use may be created before or during marriage.

<sup>a</sup> Coomes v. Elling, 3 Atk. 679.

<sup>b</sup> Finch's Law, 29.

<sup>c</sup> Coomes v. Elling, 3 Atk. 679.

Woman may before marriage, settle her money in such a way as to preserve it from debts of her husband.

Settlement by woman before marriage, of her fortune to her separate use, without intended husband's privity, does not bind him.

Husband not barred by a conveyance of a term for years to his wife before marriage for her separate use, unless he be a party to the instrument.

property which had not been already limited to her own sole use. A woman may, before her marriage, vest her entire fortune in trustees for her own use, so as to deprive her intended husband of any share in it or control over it; and she may make such a settlement of it as to enable herself to carry on trade with her own money, and not to render it or the produce of it liable to his debts :<sup>d</sup> but then such a disposition of her property, namely, to her own use, made by a woman previous to her marriage, may be impeached by her husband, if any fraud have been practised upon him with respect to it. The rule laid down on the subject is this, that a settlement made by a woman of her own fortune before her marriage, for her separate use, without her intended husband's privity, shall not bind the husband, it being in derogation of the rights of marriage.<sup>e</sup>

It must also be observed, that no conveyance of a term for years before marriage, in trust for the separate use of a woman, whether it be made by herself or by any other person, will bar a future husband's legal right over it, unless it be made with his privity and consent. And it would seem that even his privity and consent alone will not be sufficient to deprive him of his rights over it, unless his consent is testified by his being an executing party to the instrument. Such is the effect of *Turner's case*,<sup>f</sup> where it was adjudged in an appeal in the House of Lords, that a term being assigned in trust for a feme by her former husband, and she afterwards intermarrying with the late Chief Baron Turner, who aliened the term, that the same was well passed away, and that the husband might dispose thereof; and the Lord Chancellor's (Lord Nottingham) decree thereupon reversed. It does not appear by the report of this case that the term had been assigned for the separate use of the wife; but in the subsequent case of *Tudor v.*

<sup>d</sup> *Jarman v. Woolaston*, 3 T. R. 618. *Haselinton v. Gill*, in note to the above case. *Dean v. Brown*, 2 Car. & Payne, 62. <sup>e</sup> 1 Fonb. 259. Lex. Prat. 101; and see Book V. Chap. 12. of this work. <sup>f</sup> 1 Vern. 7.

*Samyne*,<sup>g</sup> Sir Edward Turner's case is stated to have been an assignment for the separate use of the wife. So in *Pitt v. Hunt*,<sup>h</sup> the question was, "Whether a term assigned in trust for the feme before marriage, without the knowledge of her intended husband, could be disposed of by the husband?" and it was ruled, on the authority of Turner's case, that it could. On this occasion Lord Nottingham, who had originally decreed in Turner's case, is said to have expressed his surprise at the decision of the Lords upon it,<sup>i</sup> saying it was now almost impossible for a man so to provide for his child, but it shall be subject to the disposal of an extravagant husband; but that he must be concluded by the Lords' judgment, as there must not be one sort of equity above stairs in the House of Lords, and another below stairs in Chancery. In this case, the assignment was by the wife herself in trust for her separate use, and was made in the presence of her husband, as reported in Chancery Cases,<sup>j</sup> although Vernon<sup>k</sup> states, that the assignment was made without the knowledge of the intended husband, and does not mention that it was made by the wife, or that it was for her separate use.

It was agreed, in Sir Edward Turner's case, that where a term is assigned in trust for a feme, with the privity and consent of her husband, there, without doubt, the husband cannot intermeddle or dispose of it. However, the case of *Pitt v. Hunt*<sup>l</sup> went still further; for there, although the wife, in the presence of her intended husband, sealed an indenture assigning her term for years to friends to be at her disposal, whether sole or covert, Lord Nottingham, on the authority of Turner's case, ruled, that the husband might dispose of the trust of this term; his Lordship saying, "he thought that, from henceforth, it would not serve turn to have the husband's consent or privity to an assignment of a term in trust for the feme before marriage, unless he was

<sup>g</sup> 2 Vern. 270.

<sup>h</sup> 1 Vern. 18. Freem. 78. 2 Chan. Cas. 73. Eq. Cas. Ab. 58.

<sup>i</sup> See 3 Rep. Chan. 224. where his Lordship is reported to have approv-

ed of the decree of the Lords in Turner's case.

<sup>j</sup> 2 Chan. Cas. 73.

<sup>k</sup> 1 Vern. 18.

<sup>l</sup> As reported in 2 Chan. Cas. 73.

Husband may dispose of the trust of a term for years, settled to the separate use of his wife, without the concurrence of the trustees.

Husband may dispose of a term in trust, to raise a sum of money for wife, without concurrence of trustees.

likewise made a party to the assignment." *Tudor v. Samyue*,<sup>m</sup> which was decided eleven years after Turner's case, and after *Pitt v. Hunt*, is to the same effect. In this case, the first husband of a woman conveyed a term for years to trustees for her separate use and benefit: she marries a second husband, who first mortgages the term, and he and the mortgagee assign to the plaintiff. The bill was against the wife and her trustees to compel them to assign over the legal estate to the plaintiff, and decreed accordingly: for, as the husband may dispose of a term for years, where the legal estate was in the wife, so he may of the trust of a term, without either the wife or the trustees joining him; and the trustees were obliged to assign this term, although the husband had made no provision whatsoever for his wife. The law is the same with respect to a term in trust to raise a sum of money for a woman: her trustees must assign it to the husband, without any provision for her out of it, as they should the trust of the term itself.<sup>n</sup>

It is not easy to understand why the husband should have this absolute power over a trust of this particular kind of property settled to the separate use of his wife, and that it should not as well extend to a trust of any other species of personal property belonging to his wife. Lord Hardwicke has stated the ground of Turner's case to be, that as the husband at law could dispose of a term for years, so he may dispose of the trust of a term, because the same rule of property must prevail in equity as well as at law;<sup>o</sup> but this reason is far from being satisfactory. It may as well be said, that because the husband is entitled absolutely at law to a sum of money vested in his wife before marriage, without the intervention of trustees, and without any particular use being expressed, he is equally entitled to it, when it has been vested in trustees for her sole use. It is worthy of remark, that the above cases

<sup>m</sup> 2 Vern. 270. Eq. Cas. Ab. 58.  
<sup>n</sup> *Walter v. Sanders*, Eq. Cas. Ab. 58.

<sup>o</sup> 2 Atk. 491.

concerning the power of the husband over the wife's term for years, relate to settlements made on her solely before marriage.

It appears that Lord Nottingham's decision in *Turner's* case was perfectly conformable to the established practice of the Court of Chancery for many years ; for in *Dayly v. Perfull*,<sup>p</sup> which was heard six years before, where the wife having assigned her term in trust for herself before marriage, and then the husband, without joining the trustees, mortgaged the trust term ; the husband being dead, the mortgagee exhibits his bill to have the land conveyed to him, or that they should redeem, and the Court dismissed the plaintiff's bill ; and the reason given for the decree was, " For since the time of Queen Elizabeth it hath been the constant practice of this Court to set aside and frustrate all incumbrances and acts of the husband upon the trust of the wife's term, and that he shall neither charge nor grant it away ; and it is the common way of providing jointures, for a woman to convey a term in trust for her upon marriage, that it may be out of the power and reach of the husband." But, as has been already shown, this case was overruled by the decision of the Lords in *Turner's* case,<sup>q</sup> by *Pitt v. Hunt*,<sup>r</sup> and by *Tudor v. Samyne*,<sup>s</sup> which have been since recognised as law in *Parker v. Windham*,<sup>t</sup> *Bates v. Dandy*,<sup>u</sup> *Jewson v. Moulson*,<sup>v</sup> and *Inclendon v. Northcote*.<sup>w</sup>

With the above exception of a term for years, every species of property may be conveyed to trustees for the separate use of a married woman, and a court of equity will enforce the performance of the trust, and protect it against the legal rights of the husband. If the trust be of the rents and profits of lands, then the conveyance to the separate use of a married woman, by whatever person or by what-

Conveyance of lands in trust to pay rents and profits to separate use of married woman, leaves the legal estate in the trustees.

<sup>p</sup> Freem. 133. 1 Chan. Cas. 225.

<sup>q</sup> 1 Vern. 7.

<sup>r</sup> 1 Vern. 18. Freem. 78.

3 Chan. Cas. 73. Eq. Cas. Ab. 58.

<sup>s</sup> 2 Vern. 270. Eq. Cas. Ab. 58.  
<sup>t</sup> Prec. Chan. 419.

<sup>u</sup> 2 Atk. 208.

<sup>v</sup> 2 Atk. 421.

<sup>w</sup> 3 Atk. 430.

ever form of instrument it may be made, differs from one not intended for separate use in this particular, that the same words, which, in an instrument framed for the latter purpose, would transfer the legal estate to the *cestui que trust*, would leave it in the trustees, if the gift were intended for the sole use of a wife. For instance, where in ordinary cases lands are devised to trustees, in trust to *pay over* the rents and profits to another, there it has been held, that the use is not executed by the statute 27 Hen. 8. c. 10., because the land must remain in the trustees to enable them to perform the trust: and so where lands are devised to trustees in trust to *permit* and *suffer* another to receive the rents, there it is held that the use is executed; \* but where lands are devised in trust, as to the rents and profits, for the sole and separate use of a married woman, it is immaterial whether the trust be declared to be “to *pay* the rents and profits to her,” or “to *permit* her to receive the rents and profits,” as, in either case, it would be held, that the use was not executed: and the reason assigned for these decisions is, that it appearing to be the intent of the devisor to secure a separate provision for a *feme covert*, free from the control of her husband, such intent could not be effectuated unless the legal estate were to remain in the trustees; for otherwise the husband would be entitled to take the profits, and so defeat the very object that the devisor had in view. These decisions have taken place merely with respect to devises; however, it is apprehended that if lands were conveyed for a similar trust, by a *feoffment* or any other species of *deed*, the same construction would be put upon it, and the legal estate be held to remain in the trustees.<sup>a</sup>

Where lands are devised in trust, as to the rents and profits for separate use, it will be held that use is not executed.

Where conveyance of real or personal estate

It seems to be unimportant at the present day, whether in devises of real or personal property to the separate use of a married woman, the limitation be to herself only, or to

x 2 Wms. Saund. 11. note 17.  
y Neville v. Saunders, 1 Vern.  
415.

a Jones v. Lord Say and Seal,

1 Eq. Ab. 383. Harton v. Harton,  
7 T. Rep. 652. Hawkins v. Luscombe, 2 Swans. 391.

a 1 Saunders on Uses, 197.

trustees for her ; as it is now settled, that if the limitation be to her only for her own separate use, without the nomination of a trustee, although the common law vests her personal property in her husband, and the rents of her real property in him during her life, still equity will consider him as a trustee for his wife, and enforce a compliance with the intention of the donor. Formerly, indeed, considerable doubt existed, whether a gift to the separate use of a married woman could be maintained against the legal rights of her husband without the interposition of a trustee for her ; as in *Harvey v. Harvey*,<sup>b</sup> where A. having a daughter married to the defendant, by his will devised his personal estate to her, to hold to her particular and separate use, and died ; and the question was, (there being no trustees to whom the devise was made,) Whether the wife should enjoy the personal estate without its being intermeddled with by the husband ? Lord Chancellor Cooper said, “ This is a great question, whether the husband shall be compelled to let the wife enjoy this personal estate to her own use ; for though it is objected, that the testator had a power to devise it so, and that his intent was to make use of such power, yet it being given to a married woman, and no contract, precedent or subsequent, from the husband, that he will not intermeddle with it, the husband’s title to this estate is subsequent to the will, and the intention being repugnant to the rules of law, viz. that a *feme covert* should have a property in personal goods, it seems to have some difficulty in it.” His Lordship also said, that if a real estate were devised to a *feme covert*, for her separate use, and a declaration that the husband should not intermeddle with the profits, he doubted this would be a repugnant clause, and the husband would still enjoy them. His Lordship, therefore, ordered it to be reserved as a case to be argued ; but it does not appear that any argument or decision was ever had upon the point in that case. But in the subsequent case of *Burton v. Pierpoint*,<sup>c</sup> it was expressly deter-

to a married woman for her sole use, husband will be considered as trustee for her.

<sup>b</sup> 1 P. Wms. 125. 2 Vern. 659.

<sup>c</sup> 2 P. Wms. 79.

mined, that a *feme covert* could not have a separate property in a personal thing, without a trustee. However, in a very few years afterwards it was held, in *Rolfe v. Budder*,<sup>d</sup> where a son had bequeathed an East India bond for 100*l.* to his mother and her assigns for ever, for her sole and separate use, that such a bequest vested the interest in her in a court of equity, as much as if the son had vested it in trustees for her separate use ; and the Court said, that there were many instances where a court of equity had decreed a husband to stand as a trustee for the separate use of his wife. A similar decision was pronounced in *Bennet v. Davis*,<sup>e</sup> where J. S. having married his daughter to one Bennet, made his will and devised the premises in question (being lands in fee) to her, for her separate and peculiar use, exclusive of her husband, to hold the same to her and her heirs, and that her husband should not be tenant by the curtesy, nor have these lands for his life, in case he survived his wife, but that upon the wife's death they should go to her heirs. The testator died, and Bennet, the husband, becoming a bankrupt, the commissioners assigned the lands in question to the defendant, Davis, in trust for the creditors ; and upon Davis bringing his ejectment, the bankrupt's wife, by her next friend, preferred her bill against Davis, the assignee, and her husband, in order to compel them to assign over this estate to her separate use. For the assignee, it was argued, that he being a creditor, and having the law on his side, it would be hard to take the benefit of the law from him ; for that, though the testator might intend these lands for the separate use of his daughter, yet that he had not executed such intention according to law, not having vested the estate in trustees for her separate use ; and *Harvey v. Harvey* was relied on. It was said, besides, that here was no trust, as the testator never intended to place any confidence in the husband, that the wife could not be a trustee for herself ; and that the husband could not be a trustee for his wife they being but one person. But the Master of the Rolls said, that he took it to

<sup>d</sup> Bun. 187.

<sup>e</sup> 2 P. Wms. 316.

<sup>f</sup> 1 P. Wms. 125. 2 Vern. 659.



be a clear case ; that it was a trust in the husband ; and that there was no difference where the trust was created by act of the party, and where by the act of law. His Honour further said, that when the testator had a power to devise the premises to trustees for the separate use of the wife, this Court, in compliance with his declared intention, will supply the want of them, and make the husband trustee ; and this has accordingly been considered as a settled point since the case of *Bennet v. Davis*, unless the observation of Lord Thurlow, in *Hulme v. Tenant*,<sup>g</sup> can be supposed to have shaken its authority. In this latter case his lordship said, that a *feme covert* could have no separate property without trustees ; however, it is right to observe, that there was no argument on that point, the facts of the case not having raised it, and that the former decisions on the subject were not cited. Indeed, the same doctrine has been acted on without objection in the modern cases of *Dixon v. Olmius*,<sup>h</sup> *Rich v. Cockel*,<sup>i</sup> and *Parker v. Brookes*.<sup>j</sup> In this last case there was a bequest of leasehold interest to the separate use of a married woman, without the nomination of a trustee, and his Honour, Sir William Grant, held it to be clear, that her husband must be considered to be a trustee for her.

The preceding cases afford instances where bequests were made to married women for their separate use, without the interposition of trustees, and the husbands were held to be trustees for their wives. But there is more doubt where the case is that of a gift from the husband himself to the wife during coverture. . . If the gift be of paraphernalia or trinkets, or if the claim for separate use be of savings out of pin-money, in such cases the husband has been considered as a trustee for his wife.<sup>k</sup> So he may give a sum of money to his wife for her separate use, as where he transferred 1000*l.* South Sea Annuities into the name of his wife, this was considered so decisive an act as amounted to an agree-

Where the husband makes a gift to his wife to her separate use he is a trustee for her.

g 1 Br. C. C. 16.

h 2 Cox's Rep. 114.

i 9 Ves. 369.

j 9 Ves. 583.

k Lucas v. Lucas, 1 Atk. 270. Graham v. Londonderry, 3 Atk. 393. Slanning v. Style, 3 P. Wms. 334.

Act by which husband gives his property to his wife must be clear.

ment by the husband that the property should become hers.<sup>1</sup>

But then for the purpose of establishing a trust in the husband in a transaction of this kind, the act by which he divests himself of his property must be clear and unequivocal, such as the transfer of the annuities into his wife's name. If the claim be that of a widow setting up, after the death of her husband, a gift from him by parol without the intervention of any third person, it will be received in a court of equity with great suspicion, and the court will expect satisfactory evidence of an act constituting a transfer of the property and sufficient transmutation of possession.<sup>m</sup> And it would seem that a mere delivery to the wife would not be a sufficient change of the possession to satisfy the Court of the intention of the husband to divest himself of the property, because the possession of the wife is the possession of the husband. So that in a case of this nature, where there is no interposition of a third person, there must be considerable difficulty in establishing a gift to the wife to her separate use, and fixing a trust on the husband. The same jealousy is entertained in equity towards a husband claiming a gift from his wife of her separate property, and the same strictness is required in the proof.<sup>n</sup>

Gift or devise to husband for separate use of wife, makes him trustee for her.

As a court of equity will make the husband a trustee for his wife, when there is a devise or gift to her for her separate use, so it follows, that if the devise or gift be to the husband himself for the same purpose, he would be held to a strict execution of the trust. Lord Hardwicke stated this to be his opinion, in *Darley v. Darley*.<sup>o</sup> So that it appears, the only concern of a court of equity in cases of this kind is, to discover whether the donor intended a trust for the separate use of the married woman or not; and that fact being once established in her favour, the Court will make even the husband himself a trustee for her, rather than suffer the trust to fail by too rigid an adherence to the legal fiction of the unity of their persons.

<sup>1</sup> 5 Ves. 71.

<sup>m</sup> *Walter v. Hodge*, 2 Swanst. 92.

<sup>n</sup> *Rich. v. Cockel*, 9 Ves. 369.

<sup>o</sup> 3 Atk. 399.

The cases above cited, with respect to the husband being considered as a trustee for his wife, either where he has been named as such, or where no trustee has been appointed, are instances of gifts or bequests to married women to their separate use ; but there can be little doubt, that the principle established by them would equally apply to every form by which such a limitation can be made. In *Tyrrell v. Hope*,<sup>p</sup> where the husband had agreed by note before marriage, that his wife should have certain property to her sole use, Lord Hardwicke held, that he and his assignees (he being then a bankrupt) were her trustees.

Agreement by note by husband before marriage that wife should have property to separate use, makes him a trustee for her.

p 2 Atk. 558.

## CHAPTER II.

## OF THE WORDS NECESSARY TO CONSTITUTE A TRUST OF PROPERTY FOR THE SEPARATE USE OF A MARRIED WOMAN.

A trust for separate use must be distinctly expressed.

Intention to bar the husband of his common law right, must appear clearly.

BUT although equity so far qualifies the law, as to permit a *feme covert* to take and enjoy property to her separate use, when it is given to her with that intent; yet such a trust should be very distinctly expressed, before the Court will establish it against the rights of the husband. It seems, however, to be immaterial in what form of phrase a trust of that nature is described; technical language is not necessary, as all that is required is, that the intention of the gift should appear manifestly to be for the wife's separate enjoyment. Such a claim on the part of a married woman being against common right, the instrument under which it is made must clearly speak the donor's intention to bar the husband, else it cannot be allowed. It will appear from the cases, that the strongest evidence of intended generosity and of bounty towards the wife will not be sufficient to give her a separate estate, unless, in addition, language be used by the donor clearly expressing the exclusion of the husband, or else directions be given with respect to the enjoyment of the gift wholly incompatible with any dominion of the husband.

The case of *Palmer v. Trevor*<sup>a</sup> furnishes a strong authority to establish the necessity of this clear intention appearing, in order to exclude the husband from the right to personal property which is given to the wife. There A. B. bequeathed 100*l.* to the plaintiff's wife, to be paid within

<sup>a</sup> 1 Raithby's Vern. 261.

six months after the testator's death ; and a bill being filed by the husband for this legacy against the executor, his defence was, that he had paid the wife, and had her receipt for the money : and it was argued for the defendant, the executor, that it must have been the intention of the testator to have bequeathed this sum for the separate maintenance of the wife, for that at the time of making the will the plaintiff and his wife lived separately, and that she was much straitened in her circumstances, which was known to the testator. However, the Lord Keeper held it to be no good payment.

Whenever a trust of property is expressed in terms to be for the "sole and separate use" of a married woman, there no questions can arise as to the intent of the donor to exclude the husband from any participation in it, because this is the proper, technical phraseology universally recognized and adopted by conveyances for the purpose of designating such a meaning ; but there are, however, several other expressions, which, though not strictly according to this established form, have yet been held to be equivalent to these words. In *Kirk v. Paulin*<sup>b</sup>, the bequest was to a married woman "to be at her disposal ;" and it was held to give her a separate estate. So in *Tyrrel v. Hope*,<sup>c</sup> where Lord Hardwicke held, that a promise in writing by the intended husband to his intended wife, that "she should enjoy and receive the issues and profits of one moiety of the estate then in the possession of her mother, after the decease of her mother," gave the wife an estate to her separate use. His Lordship said, that the note could bear no other construction, although the words "separate use" were not to be found in it ; for to what end should she receive the rents and profits, if they became the property of the husband the next moment ? And his Lordship added, that the word "enjoy" was very strong to imply separate use. So in *Darley v. Darley*<sup>d</sup> the same Judge

The words "for the sole and separate use" of the wife, exclude the husband.

The words "to be at her disposal," exclude the husband.

An agreement by husband that "his wife shall enjoy and receive rents and profits," gives her a separate estate.

<sup>b</sup> 7 Vin. Ab. 95  
<sup>c</sup> 2 Atk. 558.

<sup>d</sup> 3 Atk. 399. This case said by the Master of the Rolls, in *Lee v. Prieaux*, to be of no authority.

A trust for the "livelihood" of the wife is for separate use.

The words "the wife's receipt shall be a sufficient discharge, notwithstanding her coverture," tantamount, "to sole and separate use."

The words "the wife's receipt shall be a sufficient discharge," without adding "notwithstanding coverture," tantamount to sole and separate use.

Bonds, &c. bequeathed to a mar-

states it to be his opinion, that if an estate be given to a husband for the "livelihood" of his wife, this ought to be considered as a trust for the use of the wife ; for that the word "livelihood" shows an intention in the giver that it should be to her sole and separate use. And in *Woodman v Horsly*,<sup>e</sup> the words "the wife's receipt shall be a sufficient discharge, notwithstanding her coverture," were held to have the same meaning. So where the words of a will giving a legacy to a *feme covert* were, "That her receipt should be a sufficient discharge to the executors," without the addition of the words "notwithstanding her coverture," they were held to be equivalent to saying "to her sole and separate use" This was in the case of *Lee v. Prieaux*,<sup>f</sup> which came on at the Rolls on the petition of Sophia Lee, the wife of Richard Lee, a bankrupt, praying that certain interest and dividends of bank stock standing in the name of the Accountant-General should be paid to her separate use. The claim was made under the will of Catherine Price, who had bequeathed this money, subject to an annuity to C. Price in trust to pay the dividends to Sophia Lee, (the petitioner,) to which the testatrix added these words, "That my said trustee, her executor, &c. &c. shall not be troubled to see to the application of any sum or sums paid to the said Sophia, but her receipt in writing shall be a sufficient discharge to my said trustee, &c. &c. for the sums so paid. His Honour, in giving his judgment, said that the only question was, Whether the words in this will were sufficient to show that the testator intended to give an absolute power to the wife, independent of her husband to receive the money ? and, he added, "Upon the most mature consideration, I am of opinion that they are sufficient for that purpose. The law, undoubtedly, gives all to the husband, unless something is done to prevent it from so doing." In *Dixon v. Olmius*<sup>g</sup> the same construction was put on words of much more doubtful import ; for there the testator

<sup>e</sup> Cited in *Lee v Prieaux*, 3 Br. C. C. 381.  
C. 383.

<sup>f</sup> 3 Br. C. C. 381.  
<sup>g</sup> 2 Cox's Rep. 414.

bequeathed to Lady Waltham two bonds of her husband, Lord Waltham, and also a mortgage of Lady Waltham's estate, and also all interest due thereon; and he directed that the said bonds and mortgage "be delivered up to my said niece, Lady Waltham, whenever she shall demand or require the same." The question was, after Lord Waltham's death, whether the bonds and mortgages were to be considered as given to Lady Waltham for her separate use, and as outstanding debts against the assets of Lord Waltham? It was contended for the creditors of Lord Waltham, that the bonds and mortgage were not given to the separate use of Lady Waltham; that although, according to the law of a court of equity, any property might be given to a *feme covert* for her separate use, without the intervention of trustees, yet it is necessary that the testator should say so; that it was necessary in order to give a legacy to the separate use of the wife that it should be given in those words or at least in words excluding the husband from any control over it. But Lord Loughborough said, "That as these securities were to be given to Lady Waltham on her demand, Lord Waltham could not have obtained them from the executors without a demand made by Lady Waltham, which gave her a dominion over them; and they must, therefore, be considered as given to her separate use." In *Brown v. Clark*,<sup>b</sup> where the testator bequeathed to his sister Mary Brown, a married woman, and to his brother William Hoffinan, the interest of the residue of his personal fortune, (after the payment of some legacies,) the interest to be equally divided between them; and on the death of his sister Mary Brown, then one half of the principal to be equally divided between her children, the husband of the said Mary by no means to have any part whatever, but to be entirely for the poor children; and should she have no children alive, then to his brother's children equally between them. Daniel Brown, Mary's husband, became bankrupt; and one of the questions

ried woman, with directions that they should be delivered up to her on "her demand," are for sole and separate use.

in the case was, whether the share of Mary Brown was for her separate use? The Master of the Rolls was of opinion that she had no separate use in the interest; that nothing was given to her but the interest, no part of the principal; and that the interest was given in words that could not by any ingenuity be tortured to deprive the husband of the right that the law gives him. Here then it appears, that in order to bar a husband of his common law right to the personal property of his wife, and to the rents and profits of her real estate, there must be something more than a mere bequest to her; the bequest should be accompanied by words denoting an intention to exclude him, such as "for her sole and separate use;" or, as in *Lee v. Prieaux*,<sup>i</sup> making the receipt of the wife a sufficient discharge to the trustee. But the appointment of trustees for the use of the married woman furnishes no evidence of an intention in the donor, that the gift should be to her separate and exclusive use; for in *Lumb v. Milnes*,<sup>j</sup> George Cotton gave all his goods, chattels, and personal effects to trustees in trust, to sell and place out the money arising therefrom at interest, which he directed to be paid to his niece, Elizabeth Milnes, during the term of her natural life, subject to an annuity of 50*l. per annum*. He also bequeathed 1000 guineas to Richard Milnes, the husband of Elizabeth, immediately on the death of Elizabeth; and upon the further trust, that the trustees should pay the residue of this personal estate to, for, and upon such uses, trusts, intents, and purposes, as she, the said Elizabeth, whether covert or sole, should by any deed or writing, or by her last will, or by any writing purporting to be her last will, and by her signed and published in the presence of two or more credible witnesses, limit and appoint; and in default of appointment, to the use of her legal representative, including her husband (the said Richard). After the death of the testator, Richard Milnes became bankrupt, and the assignees filed a bill praying that they might be declared entitled to the interest and dividends

<sup>i</sup> 3 Br. C. C. 381.

<sup>j</sup> 5 Ves. 517.



of this personal estate during the joint lives of the bankrupt and his wife. The defence set up was, that Elizabeth Milnes was entitled to the interest and dividends to her separate use. But the Master of the Rolls said, that in order to exclude the husband from a participation of the interest and dividends with his wife, the testator should have expressed a decided intention for that purpose. That here he had used words, which give the principal to her separate use, but not the interest and dividends. He said, that no payment to the wife could be good, unless it was perfectly clear that the testator had authorized it, and this will had no words sufficient for that. That the intervention of trustees had never gone the length of vesting a sole and separate use in the wife. His Honour added, "That many people disapproved very much of making husband and wife separate persons, the husband being bound to maintain her, and she having separate property, not one farthing of which she is to bring into the common fund."

Vesting property in trustees for a married woman, not alone sufficient to give it to separate use.

In a case cited by counsel in the above,<sup>k</sup> the same Judge held it to be impossible to maintain that a disposition to the wife "for her own use," was for the use of her husband, and that it must be intended for her separate use, though there were no trustees. And on another occasion shortly subsequent, his Honour decided, that a direction to trustees "to pay into the proper hands of a married woman, was for her separate use."<sup>l</sup> In like manner, the words "to and for the sole use, benefit, and disposition" of the wife, have been held to pass a separate estate to her.<sup>m</sup>

A bequest to a married woman "for her own use," or to trustees to "pay into her own hands," or "to and for her sole use, benefit and disposition," gives separate property.

But in *Johnes v. Lockart*,<sup>n</sup> it was held, that a legacy to a *feme covert* to "her own use and benefit," was not to her separate use. And where the direction in a will was, that a sum of money should be paid to an unmarried woman

"To her own use and benefit," and "to and for her use,"

<sup>k</sup> 5 Ves. 520.

<sup>l</sup> Hartly v. Hurle, 5. Ves. 540.

<sup>m</sup> Adamson v. Armitage, Cooper,

C. C. 283. *Ex parte Ray*, 1 Mad. 199. 19 Ves. 416.

<sup>n</sup> Cited in *Lee v. Prieaux*, 3 Br. C. C. 383. by Belt.

not sufficient to give separate estate,

"To her use and benefit," does not give separate estate.

"To be at her disposal, and to

on her arrival at the age of twenty-one years, or her day of marriage, "to and for her use," during her life, without the words "sole and separate," her husband was held to be entitled to it.<sup>o</sup> In *Kirk v. Paulin*,<sup>p</sup> a bequest to a *feme covert*, "for her use and benefit," was held not to be to her separate use. And the same construction has been put on the words "for her own use and benefit;" where the testator had used, with respect to other parts of his property, the technical language fit to confer a separate estate. In *Willis v. Sayers*,<sup>q</sup> there was a bequest of a sum of money to a married woman "for her sole and separate use;" and afterwards, in the same will, the residue was bequeathed to her "for her own use and benefit;" and the Vice-Chancellor, Sir John Leach, held, that the latter words did not convey a separate estate to the wife, saying, that as the testator, as to the same person with respect to another gift, had appointed a trustee, and expressly directed the application of it to her sole and separate use, he knew, therefore, the technical form of excluding the right of the husband, and His Lordship could not infer that, as to this legacy, he intended what he had not expressed. And in *Roberts v. Spicer*,<sup>r</sup> where the testator hath bequeathed money and rent to trustees and directed them to stand possessed thereof, for the benefit of a married woman and her children; and that the same should not be subject to the debts, engagements, or be in any manner under the control of her husband; and also bequeathed to the same married woman 200*l*. "to and for her own use and benefit," it was decided, that these latter words did not convey a separate estate. But where a legacy was bequeathed to a married woman, to be at her disposal, and to do therewith as she shall think fit, it was ruled to be separate property; and, in *Prichard v. Ames*,<sup>t</sup> where a legacy was given to a married woman, "for her

<sup>o</sup> *Jacobs and Wife v. Amyatt*,  
1 *Mad.* 376. in the notes.  
<sup>p</sup> 7 *Vin.* 95.  
<sup>q</sup> 4 *Mad.* 409.

<sup>r</sup> 5 *Mad.* 491.  
<sup>s</sup> 7 *Vin.* Ab. 96.  
<sup>t</sup> 1 *Turn.* 922.

own use and at her own disposal," Baron Graham said, he could not entertain a doubt, that the necessary effect of these words was to give the legacy to the separate use of the plaintiff. That the testatrix, in using the words "at her own disposal," had stated the effect she wished to be produced; her intention was to give the plaintiff that power of disposition, which the law does not give her.

do there-  
with as she  
shall think  
fit," and  
"for her  
own use  
and at her  
own dis-  
posal," give  
separate  
property.

All these cases clearly prove, that there must be a manifest intention evinced by the language of the donor, that the wife shall have the exclusive property in the gift, without which courts of equity will not suffer the legal rights of the husband to be superseded. In *Palmer v Trevor*,<sup>u</sup> there existed circumstances sufficiently strong to warrant the inference, that the testator intended the bequest for the sole benefit of the wife; she was separated from her husband, and living on very limited means, with which facts it is stated, the testator was well acquainted, and from which it is scarcely possible to draw any other conclusion, than that the bequest must have been intended exclusively for her; and yet as such intention was not expressed, the Court disregarded the circumstances, and left the legacy to the operation of the law. In *Darley v. Darley*,<sup>v</sup> the words were held to be in their nature exclusive, being "for the livelihood" of the wife, and not to require any additional language or circumstance to render the intent more apparent. So were the words in *Lee v. Prieaux*,<sup>w</sup> for the direction, that the wife's receipt should be a sufficient discharge to the trustee, imported the insufficiency of the husband's receipt for that purpose, and therefore amounted to an evident intention to exclude him. But, in *Brown v. Clark*,<sup>x</sup> where the interest of a sum of money was bequeathed to the wife for life, no language having been used by the testator, intimating a design of giving her a sole property in the interest, it was held to vest in the husband's assignees. *Lumb v. Milnes*,<sup>y</sup> and *Jacobs and Wife v. Amyatt*,<sup>z</sup> were decisions of

u 1 Vern, 261.

v 3 Atk. 399.

w 3 Br. C. C. 381.

x 3 Ves. 166.

y 5 Ves. 517.

z 1 Mad. 376. in the notes.

the same nature, upon similar words. But in *Hartley v. Hurle*,<sup>a</sup> there being a direction "to pay into the proper hands of the wife," it is tantamount to making her receipt a discharge, as in *Lee v. Prioux*, and therefore expresses a manifest intention of a gift to her separate use.

<sup>a</sup> 5 Ves. 540.

## CHAPTER III.

OF THE SEPARATE PROPERTY OF MARRIED WOMEN ARISING  
FROM THEIR SAVINGS OUT OF THEIR SEPARATE PROVISIONS.

It has been shown in the former chapters that property may be limited to the use of a married woman independently of her husband, and the language which has been deemed sufficient to express the limitation to such an use, has been also pointed out. But a wife may possess separate property, which has not been derived directly under any form of instrument; and that happens, when she saves money out of her separate provision; for the money thus acquired will be as completely free from the dominion of the husband, as if it had been originally given to her separate use, although the income out of which it was accumulated had not itself been given with such an intent. The separate provisions of married women are of two kinds; first, the property which is settled or bequeathed to their separate use; secondly, the allowance which is made to them by their husbands before or during marriage, for their private expenditure during cohabitation, as for dress, ornaments, &c. &c., or during marriage for their separate maintenance, upon a separation. And the difference between the first and second kinds of provisions is this, that the former being for her separate use, is her separate estate, of which she may dispose as she thinks fit,<sup>a</sup> but the latter kind is not separate estate, of which the wife can dispose as she pleases; it is destined for personal enjoyment, and it would be con-

Separate provisions of married women of two kinds, 1st, for separate use: 2dly, for private expenditure during cohabitation, or for separate maintenance during separation.

<sup>a</sup> *Bletsow v. Sawyer*, 1 Vern. 244. *Gore v. Knight*, Prec. Chan. 255. *Fettiplace v. Gorges*, 1 Ves. jun. 48.

Savings  
out of se-  
parate  
estate are  
separate  
property,  
and may  
be dispos-  
ed of by  
wife.

trary to the intent of its creation, if she were capable of depriving herself of it.<sup>b</sup> If she save money out of her separate estate, the savings are always hers, against all claimants.<sup>c</sup> And not only the produce out of her separate estate will be hers, but if she purchase lands or houses with what she has saved, the Court will follow the purchase, and secure it against the husband for her benefit.<sup>d</sup> And where a husband had agreed before marriage that his wife should dispose of the surplus of her separate estate by any writing under her hand, &c. &c., she saved a considerable sum of money, with which she bought land, and disposed of the purchased lands to a stranger, in pursuance of the power. The husband, after his wife's death, filed a bill to have these lands; and Lord Jefferies decreed that he should have them, as purchased with his wife's money; but the decree was reversed in the House of Lords, because they were bought with the money raised out of the separate estate of the wife, of which she had a power by the articles to dispose.<sup>e</sup>

Wife's sav-  
ings out  
of provi-  
sions made  
before  
marriage,  
separate  
property.

With respect to the savings by wives out of allowances given to them by their husbands for private expenditure during cohabitation, they are not always separate property, but are sometimes liable to the demands of the husband's creditors. As to the claims of the husband, or his representatives, on such a fund, they seem to be altogether without foundation, for it would be strange that either he or his executors should have the power of reclaiming what he had given to his wife, or any of the fruits of the gift. But the claims of creditors stand on very different grounds, as a gift or allowance of this nature may be a gross fraud on them. And when they demand satisfaction of their debts, from savings made by the wife out of an allowance, which had been

<sup>b</sup> Hyde v. Price, 3 Ves. 437.

<sup>c</sup> Eastly v. Eastly, 2 Eq. Ab.

148. Gore v. Knight, 2 Vern. 535.

Hearle v. Greenbank, 3 Atk. 709.

Fettiplace v. Gorges, 1 Ves. jun. 48.

<sup>d</sup> Eastly v. Eastly, 2 Eq. Ab.

148. Gore v. Knight, 2 Vern. 535.

<sup>e</sup> Stated in a note in 2 Eq. Aq.

149.

given to her by her husband, as forming part of his assets, the event of such claim would be decided by these circumstances, whether the allowance were made by settlement before marriage or after it, and if after marriage, then whether it were made voluntarily, or in compliance with an agreement before marriage. For if the provision had been made by settlement before marriage, or had been made after marriage, in compliance with articles entered into before it, then it seems that such allowance not being voluntary, it, with its consequences, would be held to be good even against *bona fide* creditors, and such seems to be the result of the cases on this subject. In *Herbert v. Herbert*,<sup>f</sup> several questions arose concerning a woman's pin-money or separate provision, upon which it does not appear what judgment was given by the Court; but it is stated in a note to the report, that Hutchins, one of the counsel, cited Sir Paul Neal's case, wherein he said it had been decreed, that if a woman has pin-money or a separate maintenance settled on her, and she by management, or good housewifery, saves money out of it, she may dispose of such money so saved by her, or any jewels, &c. bought with it, by writing, in the nature of a will, if she die before her husband, and shall have it herself, if she survive him, and such money, jewels, &c. shall not be liable to the husband's debts. It is not stated in Sir Paul Neal's case, whether the separate maintenance was settled on the wife before or after marriage, yet it is to be presumed from the subsequent case of *Wilson v. Pack*, which is reported in the same book,<sup>g</sup> that it must have been before marriage, or if after, that it was in pursuance of articles entered into by the husband before the marriage. For in this latter case the plaintiff, a creditor of one Pack, filed a bill against his widow and others, praying a discovery of assets, and to subject to a course of administration jewels of the widow, which she alleged that she had purchased out of a separate maintenance settled on her before marriage, by her husband. It was contended for the

Savings out of provisions made after marriage in pursuance of agreement before marriage, separate property.

If provisions made after marriage, not in pursuance of settlement before marriage, savings out of them liable to creditors.

<sup>f</sup> Prec. Chan. 44.

<sup>g</sup> Prec. Chan. 295.

plaintiff, that allowing these jewels to have been purchased with her savings out of the pin-money settled on her before marriage, yet they ought to be considered as paraphernalia, and of course subject to her husband's debts. They also contended that though the plaintiff could not break in upon a settlement of pin-money made before marriage, or made after marriage, in pursuance of articles entered into before, yet the property in the money was changed by the purchase of jewels, and became the husband's. However, it was not proved in the cause that the settlement was made before marriage; and the Lord Chancellor said, that if such proof had been made, the jewels would not have been subject to the husband's debts, but that under existing circumstances the creditors were entitled to them. In Lady Tyrrel's case,<sup>h</sup> Lord Keeper Finch says, "That as to the savings so long as the husband and wife do cohabit, they are the husband's, for if the wife out of her own good housewifery do save any thing, this will be the husband's, and he shall reap the benefit of his wife's frugality; and that the reason of it is, because when the husband agrees to allow his wife a certain sum yearly, the end of this agreement is, that she may be provided with clothes and other necessaries, and whatsoever is saved out of this, redounds to the husband.

When the Lord Keeper said, in the above case that the savings out of an allowance should be the husband's estate, he must have intended the observation to apply only to such a case as that before him, namely, where the claim was between a creditor of the husband and the wife; and no doubt when the question is between these parties, the agreement and the allowance being after marriage, they may be considered as a fraud upon the creditor, and the savings of the wife, in that point of view, may very fairly be claimed as the estate of the husband; but if the claim on such savings be made either by the husband or his personal representatives, then it is apprehended that at this day it would be disallowed, and the wife would be protected in

<sup>h</sup> 1 Freem. 304.



the enjoyment of the fruits of her thriftiness; and accordingly, in *Slanning et Al. v. Style*,<sup>i</sup> the Chancellor held, that where a husband, after marriage, voluntarily allowed his wife to make profit of the produce of his farm, viz. pigs, poultry, butter, &c. her savings should be her own. In this case the husband had borrowed 100*l.* from his wife, which she had saved in this manner: after his death the wife claimed an allowance of this sum as a creditor out of his assets, and the Court directed that she should be allowed to do so, saying that courts of equity had taken notice of these separate interest in *femes covert* by the agreement of their husbands; that it was a reasonable encouragement of a wife's frugality; and that such an agreement would be of no avail, if it were determined by the husband's death. His Lordship added, that her claim was strengthened by the circumstance of her not having to contend with a creditor; and he mentioned a case where there was an agreement between husband and wife that she should have two guineas from the tenant on the renewal of each lease, and the money was allowed to be her separate property.<sup>j</sup>

Savings out of an after-marriage allowance, the wife's separate property against the husband and his representatives.

But where a husband separates from his wife, and allows her an annual sum for her maintenance during the separation, if she save any money out of the allowance, the savings are her separate property,<sup>k</sup> which she may dispose of in any way, and neither her husband nor his creditors have any right to it. In *Gorges v Chancy*, which is reported in *Tothil*,<sup>l</sup> and cited and approved of in *Pridgeon v. Pridgeon*,<sup>m</sup> husband and wife by agreement separated and lived apart, and agreed that the wife should have 150*l.* per annum separate maintenance, out of which she had saved some money, and put it out to interest, and took bonds in a friend's name, and disposed of the money by will, and this upon debate was established a good disposition. Sir

Wife may dispose of by will savings out of separate maintenance allowed to her during separation.

i 3 P. Wms. 337  
j See also *Ward and Another v. Summer and Others*, Finch's Chan. Cas. 56.

k *Bletsow v. Sawyer*, 1 Vern. 244.  
l *Tothil*, 97.  
m 1 Chan. Cas. 117.

Paul Neal's case also<sup>n</sup> is an authority to prove that the savings by a wife out of her separate maintenance is her separate estate, and may be disposed of by will, and that they are not subject to her husband's debts. And it was ruled by Lord Coventry in Sir Arthur Gorge's case,<sup>o</sup> that if there be a separation, and a separate maintenance, then the savings shall be for her own particular use, a decision which was cited and adopted by Lord Keeper Finch, in Lady Tyrrel's case.<sup>p</sup> Indeed, in *Guge v. Lyster*,<sup>q</sup> the right of a married woman to dispose by will of whatever she had saved out of her separate maintenance during separation was considered so far settled, that the only question raised in the case was, whether in fact Lady Boteler had made the disposition of this property, which it was alleged on the part of the respondent that she had. And in *Dutton v. Dutton*,<sup>r</sup> Lord Chancellor Cowper allowed the wife to keep the plate, &c. which she had bought or was given to her by her friends during the separation.

It is to be collected from the cases in this chapter, that the savings by a *feme covert* out of her separate property are hers, and that she may dispose of them as she likes, and that if a husband by settlement before marriage, or by settlement after marriage, in pursuance of an agreement before marriage, grant an annual sum to his wife for pin-money, or, if he allow her a separate maintenance upon a separation, her savings out of either provision will be protected in equity against the husband and his creditors; and that if the savings arise from an allowance after marriage, during cohabitation, and not in compliance with any agreement before it, these savings will be liable to creditors only, but the gift and its produce will be good against the husband and his representatives.

<sup>n</sup> Cited in *Herbert v. Herbert*,  
Prec. Chan. 44.

<sup>o</sup> 1 Chan. Rep. 125. 1 Chan.  
Cas. 118.

<sup>p</sup> Freem. 304.

<sup>q</sup> 1 Bk. P. C. 112.

<sup>r</sup> 4 Vin. Ab. 177.

## CHAPTER IV.

OF GIFTS OF PERSONAL ORNAMENTS TO THE SEPARATE USE OF  
FEMES COVERT.

BESIDES these separate provisions and the savings out of them, there is another kind of separate property, which a married woman may possess, not the result of any settlement or contract, but the spontaneous produce of the liberality of the husband or of a stranger, viz. jewellery and other ornaments of the person, given before or during the marriage : and her right to retain gifts of this nature is sometimes disputed. The decision of such cases depends on these circumstances, whether the gift was before marriage or after marriage ; whether it was a gift by the husband or by a stranger ; and whether the right to the gift is litigated between the wife and the personal representatives of her husband, or between her and her husband's creditors. When the question as to the right to retain a gift is between the widow and her husband's creditors, it seems to be immaterial whether the gift was made before or after marriage, if it came from the husband, as in either case the creditors will be preferred. So it was ruled in *Ridout v. Lord Plymouth*,<sup>a</sup> where the question was, whether jewels, rings, pictures, dressing plate, and other trinkets given to Mrs. Lewis before marriage, were her separate estate. Lord Hardwicke said, that it was a very unfortunate and very hard case, that Mrs. Lewis should be stripped of these things ; but that though she had an absolute property in the jewels by the gift before marriage, yet that

Gifts to married women by husbands or strangers, before or after marriage.

Gifts by husband to wife, before and after marriage, or jewellery, &c. &c. liable to creditors.

on the marriage the law vested them in the husband, and where his personal estate was insufficient to pay his debts, the wife could not set up a claim ; and that to consider him as a trustee of the jewels for the wife, would be a manifest fraud and prejudice to the creditors. There were other articles given *after* the marriage, viz. mourning rings, family pictures, &c. &c. &c., which his Lordship said there was no pretence for considering as her property. This case does not state whether the gifts before marriage came from the husband or from a third person ; it is, however, immaterial, for if they were the gift of a stranger, and not given as a wedding present (from which a gift to separate use might be presumed), they would on the marriage become the husband's like any other personal property of the wife ; and if they were the present of the husband, they would then be at the utmost her paraphernalia, which would not be protected from his creditors, if his assets were deficient. But as to the gifts after marriage, if they came from a stranger, they might have been looked on as given to the separate use of the wife ; but his Lordship having said that there could be no pretence for considering them as the property of the wife, it is most probable that they were presents made by the husband, which would not be valid against his creditors.

Gifts by strangers after marriage, not liable to creditors.

Gifts from strangers, before and after marriage, good against husband and his representatives.

So where the gifts were not from the husband, and were given both before and after marriage, and were claimed by the husband's personal representative, the wife was held to be entitled to them in her own right. This was in the case of *Graham v. Lord Londonderry*,<sup>b</sup> in which the question was, whether Lady Londonderry, who was afterwards married to the plaintiff, was entitled in her own right to jewels, some of which had been given to her by Governor Pitt, her late husband's father, on her marriage with his son, and others of them given to her after her marriage with Lord Londonderry by the regent of France, Lord Hard-

<sup>b</sup> 3 Atk. 393.

wicke said, that as to the diamonds given to her by Governor Pitt on her marriage, he thought she was entitled to them in her own right ; that as to the jewels which were said to be a present from the regent of France, he thought she was entitled to them also, for being a present from a stranger during coverture, it must be construed as a gift to her separate use, though by no means so clear a case as the other. His Lordship also added, that, though he admitted that a husband might make a gift to his wife, which should enure to her separate use, yet, that when he gave ornaments expressly for the purpose of being worn by her, that they were to be considered as paraphernalia : for, if they were to be considered as a gift to her separate use, she might dispose of them absolutely, which would be contrary to his intention. In this case, Lord Hardwicke is reported to have intimated a doubt, whether a present from a stranger to a wife after marriage should be deemed her property, as between her and her husband's personal representative ; for he is made to say, that such a case is by no means so clear as that of a present from the husband's father before marriage. Now, it is difficult to conceive, what advantage the present from the husband's father before marriage has over that by a stranger after marriage, so as, in the first case, to vest a clear right to it in the wife against her husband's representatives ; and, in the second, to leave it doubtful. The intention with which a gift is made, whether before or after marriage, can be the only true criterion for deciding in whom the property vests. Where the gift is of a sum of money to a married woman to her separate use, which is generally made by deed or will, we have seen, that the intent of the donor, that it should be to her separate use, must be clearly expressed, before the legal right of the husband can be ousted. But where the present, is of that nature as of jewels, &c. &c. which is generally made by a direct transfer into the hands of the person for whom it is intended, without the medium of any legal conveyance, there the intention is oftener to be collected

from the occasion on which it is made, and the person by whom it is given, than from any express declaration on the subject. When a stranger, as the Regent of France in the above case, makes a present of diamonds to a married woman, is it not much more probable that he intended them exclusively for her, without giving any right or property in them to her husband, than where a similar present comes from the father of the intended husband to the intended wife. The father of the intended husband may look forward to the enjoyment of these ornaments by his grandchildren, and wish that they may not leave the family, an anxiety which scarcely can be felt by a stranger, who seldom looks further in transactions of that kind than the gratification of a liberal disposition. It is, therefore, probable, that this case is misreported in this respect, and that His Lordship was misunderstood, as there is no reasonable ground for the distinction taken.

If a question were to arise between a wife and the creditors of her husband, as to the right to jewels or other ornaments, which had been given to her by a stranger after marriage, it is apprehended, that, on the principles on which the above cases were decided, it would be held, that the creditors had no right to them. Creditors are deemed to be entitled to money or ornaments purchased with money, or to ornaments the gift of the husband, because such a gift is taken from the fund liable to pay the debts, and any diminution of the means of payment is a fraud upon the creditors to that extent. But this is a reason that does not apply to gifts of that kind coming from a stranger; for, although such presents when made to a married woman, are immediately vested by law in the husband, still a court of equity, it is presumed, would support them against creditors; as the source from whence they were derived never was liable to their demands, and as the donor must have intended them for her exclusive use.

These cases seem to establish, that, where there is a gift of ornaments by the husband to his wife before or after

marriage, they will be liable to the husband's debts, but that as against the husband himself, they are hers, and she may dispose of them during his life, unless he intended them to be her paraphernalia. And that creditors are not entitled to levy the amount of their demands against the husband, out of the gift of ornaments which a stranger has made to his wife.

## CHAPTER V.

OF THE MODES IN WHICH MARRIED WOMEN MAY DISPOSE OF THEIR SEPARATE PROPERTY, WHERE IT HAS BEEN GIVEN TO THEM WITH A POWER OF DISPOSING OF IT, WITHOUT ANY PRESCRIBED FORM.

Power over separate property depends on intention of donor.

HAVING thus endeavoured to ascertain the various modes in which married women become entitled to property to their separate use, the next inquiry will naturally be, what power of disposition they possess over it. And this power, like their title to the property itself, seems to depend altogether on the intention of the donor, which, in this instance also, is to be collected from the language of the instrument by which the interest has been created

A feme covert, acting with respect to her separate property, competent to act in all respects as if she were sole.

The rule in equity upon this subject is, "That a *feme covert* acting with respect to her separate property is competent to act in all respects, as if she were a *feme sole*."<sup>a</sup> But she is incapable of binding herself personally, as a *feme sole* may. Her engagements, when they have any effect, attaching upon her separate estate only. Besides, this rule does not apply to real estates limited to the separate use of a married woman and her heirs, for she is not considered as the absolute owner of such property by virtue of this limitation, as a *feme sole* would be. This rule must be understood only of that kind of interest belonging to the wife, which the law would give to the husband on his marriage, as personal property, and the rents and profits of her real estate during her life ; but if an estate of freehold be limited to trustees for the sole and separate use of a married woman and her heirs, although such a limitation would entitle her to the rents and profits during the mar-

Competency of feme covert to dispose of separate estate extends to personality only.

<sup>a</sup> Peacock v. Monk, 2 Ves. sen. 180. Hulme v. Tenant, 1 Br. C. C. 19.



riage, and would enable her to dispose of them as she thought fit, yet she could not without the concurrence of her husband dispose of the reversion, nor could she bar him of his tenancy by the curtesy, if the estate were of inheritance. In the case of *Peacock v. Monk*,<sup>b</sup> Lord Hardwicke said, there were but two ways by which a married woman could prevent the inheritance of an estate settled to her separate use from descending upon her heir at law, namely, by reserving such power to her by a conveyance to uses and trusts before the marriage, or else by fine, in which she and her husband join after the marriage with a deed to lead the uses of it, reserving such power to her. And his Lordship denied that a woman having a real estate before marriage could, in consideration of that marriage, enter into an agreement with her husband that she may, by writing under her hand, executed in the presence of witnesses or by will, dispose of her real estate. He said that this rested in agreement, and that though it might bind her husband from being tenant by the curtesy, yet that it could not bind the heir. So that his Lordship was of opinion, that the mere limitation of a real estate to the separate use of a married woman and to her heirs, did not confer upon her the power of disposing of the reversion as she pleased. Indeed a case was cited at the bar on the same occasion, where the real estate of the wife had been settled before marriage to her separate use, as if she were a *feme sole*; and it was insisted, that as to the trust of this estate, she was to be considered in this Court as if a *feme sole*; and they compared the case to that of personal estate the separate property of the wife, to which kind of property it is incident, that she may make a will or appointment of it. But it was replied, that as to land there was a difference; for that the husband could not give her a power to make a will of lands, and that the heir at law was concerned in not being disinherited, but in such a way as that she should be secretly examined; and Lord Chief Justice Willes determined that a will under such circumstances was void. The

reporter adds, that this determination had been the subject of a good deal of discourse, it seeming extraordinary that she should not have this in equity as incident to her ownership. However, this opinion of Lord Hardwicke, that the heir at law of the wife could not be bound by a mere agreement previous to marriage between husband and wife, was not attended to by Lord Northington in the decision of *Wright v. Lord Cadogan*.<sup>c</sup> There marriage articles were executed, by which it was, amongst other things, agreed between the intended husband and wife, that all such estates real or personal which should descend to her during her coverture, or to her husband in her right by descent, or by virtue of any remainder or reversion, &c. &c. should be and enure to the said wife for her sole and separate use, and to be applied and disposed of from time to time as she should by any deed or deeds executed in her lifetime, or by her last will or testament, direct or appoint, notwithstanding her coverture. At the time of the marriage the wife was entitled to a reversion in fee, the legal estate in which was at the time of the execution of the articles vested in trustees. She afterwards made her will devising this reversion, and died. It was objected that a woman, not having been seised of the legal estate in this reversion antecedent to her marriage, could not retain a power over it, as she could over a legal estate, so as to have, during the coverture, a power to dispose of it in the same manner as she might have done, if she had not put herself under coverture. But Lord Northington held the will to be a valid disposition of the estate. There was an appeal from this decision, but the Lords affirmed it.<sup>d</sup> It appears from the subsequent case of *Rippon v. Dawding*,<sup>e</sup> that if the wife had been seised of the legal estate, the decision would have been the same; the principal being, that as the agreement was before marriage, the wife might have compelled the husband to join with her in a fine.<sup>f</sup> Now this case of

Wife may dispose by will of real estate settled to her separate use, by vir-

c Amb. 468. 2 Eden's Cas. 239.  
 6 Br. P. C. 156.  
 d 6 Br. P. C. 156.

e Amb. 565.  
 f Sugden on Powers, 152.

*Wright v. Cadogan* proves that a *feme covert*, to whose separate use a real estate has been limited, cannot dispose of that estate from the heir merely by virtue of the power incident to that kind of limitation, as she was, in this instance, obliged to have recourse to the agreement before marriage for the purpose of sustaining her appointment of the estate by will. However, a will under such an agreement, must be made subsequent to the marriage; for if made before the marriage, although subsequent to the agreement, it would be revoked.<sup>g</sup> And it is doubtful even whether it could have been agreed that the marriage should not revoke the will, even if there had been express words for that purpose, because it would be a stipulation in direct opposition to a positive rule of law.<sup>h</sup> However, Lord Thurlow denied the power of the husband and wife by agreement before marriage to bind the heir. His Lordship said, that in order to enable her to make a will of real estate, the legal estate must be conveyed to trustees, for by agreement, while resting in agreement only, the husband could not bind the heir, he could bind only himself and the legal estate ought to be conveyed by legal conveyances.<sup>i</sup> But then the point did not arise in the case, nor was *Wright v. Cadogan*,<sup>j</sup> nor *Rippon v. Dawding*,<sup>k</sup> adverted to. It seems, too, that the husband may, by agreement after marriage, enable his wife to convey her real estate by a fine in which he has not joined; and upon this reasoning, that as a fine levied by a married woman without her husband will bind her and her heirs, if it be not avoided by the husband;<sup>l</sup> so where the husband has agreed that his wife may levy a fine without him, he is estopped by his deed, and could not, if he would, avoid her act.<sup>m</sup> It has been decided also, that a husband

tue of an express power reserved to her before marriage.

Wife may convey her inheritance by fine without her husband, with his consent.

<sup>g</sup> *Hodsden v. Loyd*, 2 Br. C. C. 534.

<sup>h</sup> See the judgment of Justice Ashurst in *Doe v. Staple*, 2 T. R. 697.

<sup>i</sup> *Hodsden v. Loyd*, 2 Br. C. C. 543.

<sup>j</sup> Amb. 468. 2 Eden's Cases, 239. 6 Br. P. C. 156.

<sup>k</sup> Amb. 565.

<sup>l</sup> Year Book, 17 Ed. 3. 52. & 78. 17 Ass. pl. 17. Br. Abr. tit. Fines, pl. 75.

<sup>m</sup> See the judgment of Lord Loughborough in *Compton v. Collinson*, 1 H. Black. 334.

Wife may  
surrender  
copyhold,  
settled to  
her sepa-  
rate use,  
without  
husband,  
with his  
consent.

may by agreement after marriage, enable his wife to surrender her copyhold estate without his joining in the surrender. This was settled in the case of *Compton v. Collinson*,<sup>a</sup> where Michael Collinson had by indenture covenanted with trustees that his wife (from whom he had been separated by deed for many years) should enjoy to her own use all the real and personal estate of her father, as well as any other estate, that might in any manner come to her, during the coverture, and that he would join in levying a fine, suffering a recovery, or making a surrender of such estates, and in limiting the same to such uses as she should appoint. At the time of the execution of this deed, copyhold premises had descended to the wife, as the customary heir of her father. She, being afterwards admitted to the copyholds, surrendered them to the use of her will, her husband not having joined in such surrender. She afterwards alone also surrendered these premises to John Willis, who was admitted, and who surrendered to the use of his will. Mrs. Collinson afterwards made her will, in which she recited the surrenders, and that they had been made in trust to secure to the said Willis such sums of money as he should during her life advance for her; and she thereby declared, that if the copyholds should not be sold at her death for the purpose of paying her debts, that then the said Willis should stand seised thereof, charged with such sums as she should owe him, &c. &c., in trust for himself, his heirs, &c. Mrs. Collinson died, and the question was, whether Willis took any estate under these surrenders. It was argued for the heir at law of Mrs. Collinson, that as the husband had not joined in the surrenders, they were bad, and the descent to the heir at law must take effect. But it was answered, that the reason of the necessity of the husband joining in the surrender of his wife's copyholds, was, because he had an interest in the lands during the coverture, which was not to be given up without his testifying his assent. That in this case, however, the reason did not

exist, as the husband had by his agreement renounced his interest, and there was therefore an end of the necessity for his joining. And the Court of Common Pleas certified to the Court of Chancery, that Willis took an estate to him and his heirs in these copyholds, Lord Loughborough saying, "That the main and substantial ground of the case is, that the wife is the tenant of the copyhold and not the husband; that the estate can be forfeited or surrendered only by her acts, not by his; that the authority which he acquires by his martial rights to direct and control her acts, is by his covenant in the present instance annulled, or at least suspended, and there is, therefore, no impediment to the validity of an act passed in the Court of the Manor between her and the Lord." And it has been lately held on the same principle, viz. the assent of the husband, that a surrender by a wife, entitled to copyhold, to the use of her husband, is valid, he having testified his assent by his immediate admittance under it, and she having been solely and secretly examined by the steward.<sup>o</sup>

It is to be attended to in these cases, where it was held that a married woman, to whose separate use real estate had been settled, could bar the heir and prevent the estate from descending upon him, it was not so decided upon the ground that a *feme covert*, having separate estate, was competent to act with respect to it as if she were sole, but upon the ground of an agreement between the husband and wife, that she should have such a power; so that the rule, that a *feme covert* acting with respect to her separate property, is competent to act in all respects as if she were sole,<sup>p</sup> must be understood only of personal property, and of the rents and profits of real estate during her life. If an estate of inheritance be limited to her for her separate use, without a power of appointment, it seems she cannot bar her heirs by any act except by fine.<sup>q</sup> It has indeed been decided,

<sup>o</sup> Scammon v. Maw, 3 Bing. 378. 190. Hulme v. Tenant, 1 Br. C. C.

<sup>p</sup> Peacock v. Monk, 2 Ves. sen. 16.

<sup>q</sup> 1 Sanders on Uses, 4th edit. 345.

that when the wife has the freehold for her life, by way of separate estate, the husband has no seisin in her right, and that the wife is competent to make a good tenant to the freehold by deed, without a fine levied by her and her husband.<sup>r</sup> The principle of this decision was, that a *feme covert*, who has the equitable freehold of lands by way of separate estate, may aliene that estate, and consequently may transfer the freehold to the tenant. However, this case does not prove that a married woman, having an estate of inheritance to her separate use, can bar her heirs without a fine; it merely establishes that she can dispose without a fine of so much of the inheritance as the law would give to her husband, namely, the rents and profits of her life estate.<sup>s</sup>

Rule that  
"a feme  
covert is  
competent  
to act with  
respect to  
her separate  
estate,  
as if she  
were sole,"  
differently  
constructed.

But although the rule that a married woman, acting with respect to her separate estate, is competent to act in all respects as if she were a *feme sole*, is universally allowed to govern the powers of married women over such property, yet considerable difficulty and much difference of opinion have occurred in the construction and application of it. It is not denied that a married woman can charge and alienate personal property and the rents and profits of lands for her life, which have been given to her separate use, to the full extent of her interest in it, provided she has not been restricted by the terms of the instrument under which she derives it; but then the difficulty is to ascertain when she is restricted, and when she is not, and if she be restricted, how far the restriction extends. Some judges construe this rule to mean precisely what it expresses, namely, that a married woman shall have as much power over her separate property as she would have if she had the same property and were sole; whilst others are of opinion, that the same words, which in a deed or a will would give a woman an uncontrolled power over the property conveyed by it, if she were sole, ought to receive a different construction if she were married;<sup>t</sup> and that the same contract by her

<sup>r</sup> Burnaby v. Griffin, 3 Ves. 266.

<sup>t</sup> Bradley v. Peixoto, 3 Ves. 325.

<sup>s</sup> See 1 Preston on Conveyancing, 35.

would produce a different effect under these two different circumstances.

Some contend, that where property has been limited to the separate use of a married woman, without any power of alienation being annexed to the gift, there she has an unlimited dominion over it;<sup>u</sup> whilst others hold, that in such a case no such power can be exercised.\* Some would confine the power of alienation by a *feme covert* to the particular form, if there be any, pointed out by the instrument giving her the separate estate;<sup>w</sup> while others have disregarded the mode of alienation directed by the instrument, and insisted on a power in her of disposing of it in any way, though different from that prescribed by the donor.\* However, in the midst of great perplexity and confusion, this much may be collected from the cases, that wherever money or the interest of money, or the rents and profits of lands for her life, have been limited to the separate use of a married woman, with a power to appoint, but without any prescribed form of appointment, there she has the complete property in the thing given to the full extent of her estate in it, and may alienate it and all that arises from it, in any manner in which she thinks proper.

*Allen v. Papworth*<sup>x</sup> furnishes an instance of this kind, where the *feme covert* had a power of appointment without being limited to any certain mode of exercising that power. There Lord Hardwicke held, that if a married woman, having power to receive the profits of an estate to her separate use, and to appoint them as she pleased, brings a bill jointly with her husband for an account, and submits that the profits should be applied to the payment of the husband's debts, for which a decree passes, that bill, to which she was made a party without collusion, is as much

Personal property, or rents and profits of lands for life of married woman, settled to her separate use, with a power to appoint, but no form prescribed, gives complete property. Married woman having separate estate, with power to appoint as she pleased, may appoint by bill to which husband is a party.

<sup>u</sup> *Peacock v. Monk*, 2 Ves. sen. 190. *Fettyplace v. Gorges*, 1 Ves. jun. 46.

<sup>v</sup> *Whistler v. Newman*, 4 Ves. 129. *More v. Huish*, 5 Ves. 693.

<sup>w</sup> *Socket v. Wray*, 4 Br. C. C. 483.

<sup>x</sup> *Hulme v. Tenant*, 1 Br. C. C. 16. *Heatly v. Thomas*, 15 Ves. 596.

<sup>y</sup> Ves. sen. 163.

an execution of her power, as an actual appointment would have been, and the profits shall be bound by the decree. This case only proves, that, where the *feme covert* has a separate estate, without a prescribed form of appointment, she may appoint by bill, filed by her jointly with her husband; but *Grigby v. Cox*<sup>z</sup> is a direct authority to prove that a married woman, having property to her separate use, with a power to appoint, but without any form of appointment being directed, may appoint in any way in which she pleases; for in that case, on marriage, an estate was vested in trustees in trust to receive the rents and profits for the separate use of the defendant's wife, and as she should direct or appoint. The wife sold by deed of appointment to the plaintiff, the husband covenanting that the purchase should be free from incumbrances, but the trustees were not consulted. The bill was filed by the purchaser to have the effect of this bargain. For the wife it was insisted, that the plaintiff had colluded with her husband to take her separate estate from her; that he had paid the money to her husband, though he knew of the settlement to her separate use, and that her friends and trustees had not been consulted. Lord Hardwicke said, that, with whatever suspicion he might look at such a transaction, yet defendant's case not being proved, he should decree for the plaintiff; for that the rule of the court is, that where any thing is settled to the wife's separate use, she is considered as a *feme sole*, and may appoint in what manner she pleases, and that unless the joining of her trustees is made necessary, there is no occasion for that. These two cases are instances of estates of inheritance being settled to the separate use of married women, in which their appointments of them were held to be valid, which may appear to contradict the position above laid down, that the rule respecting a *feme covert*'s power over her separate estate is to be applied to her personal property only, and the rents and profits of real estate for her life only. But it must be ob-

<sup>z</sup> 1 Ves. sen. 517.



served that in these cases the appointments were made by virtue of an express power to do so, and that they could not have been made by the mere force of their separate estates, as stated in Lord Thurlow's rule on the subject.<sup>a</sup> As the owners of separate estates, the wives might have disposed of the rents and profits for their lives; but without express powers given to them for the purpose, they could not have incumbered the inheritance in the one case, nor have disposed of it in the other. In like manner, in *Pawlet v. Delaval*,<sup>b</sup> money was vested in trustees for the separate use of the wife of Lord Pawlet, subject to her direction and appointment during coverture, but without any particular forms having been prescribed in which she should execute that appointment. Lord and Lady Pawlet afterwards join in calling in this money, which had been placed out in mortgages, and discharge the trustees from any future trust concerning the same. The money was received by Lord Pawlet, and put out on mortgages in his name alone, and the interest was paid to him till his death, and after his death Lady Pawlet gave receipts for this interest as his executrix. It was held<sup>c</sup> that Lady Pawlet had a power to dispose of this money, and that these acts were a sufficient appointment to her husband under that power.

And in *Chesslyn v. Smith*,<sup>c</sup> where the interest and dividends of stock were settled to the separate use of Anne Chesslyn the wife, during the life of Richard Chesslyn, and as she should direct or appoint, by any note or writing under her hand; and in default of appointment, for her sole and separate use, with remainder to her husband, his heirs and executors, if he should survive her; a bill was filed by Chesslyn and his wife against the trustees, praying a transfer to the husband for his own use and benefit, upon his giving them his personal security for the same, the wife being desirous that such transfer should be made on such security; the trustees submitted to act as the Court should direct, and the Master of the Rolls

The interest of stock, settled to the separate use of the wife for life as she should direct and appoint, with remainder to her husband, his heirs, &c. &c. transferred to husband at the desire of husband and wife.

<sup>a</sup> 2 Ves. sen. 190.  
<sup>b</sup> 2 Ves. sen. 663.

<sup>c</sup> 8 Ves. 183.

(Sir W. Grant) having taken some time to consider, made the decree as prayed by the bill, observing that there was abundance of authority, more than was necessary, for this bill.

Money bequeathed to the wife for her separate use, as she should direct and appoint, she may dispose of it by will.

So *Rich v. Cockell*<sup>d</sup> proves that, under similar circumstances, the *feme covert* may dispose of her interest by will. There the sum of 500*l.* vested in the 3 per cent. consol. bank annuities was bequeathed to Anne, the wife of William Cockell, for her sole and separate use, as she should direct and appoint, and that her receipt, direction, or appointment, should, notwithstanding her coverture, be a sufficient discharge to her trustees in the payment or disposal thereof. Anne Cockell made her will, bequeathing this sum to the plaintiff, and a question arose, Whether, the trust being for her separate use, she would be enabled to dispose of it by will, though a will was not alluded to in the instrument creating the trust? And it was held that she had such a power, Lord Eldon saying, that the trust being for her separate use, although the instrument containing it did not determine as to the mode of disposition, whether by deed or will, or other writing, her interest was of such a nature as gave her a power of willing it.

Estates vested in trustees for separate use of *feme covert*, with full power and dominion over the same, she may charge same by grant of annuity.

Thus also in *Power v. Bailey*,<sup>e</sup> where, previous to marriage, estates of the intended wife were vested in trustees for her separate use, with full power and dominion over the same; after the marriage, she, by deed reciting her power over her separate estate, granted an annuity for the joint lives of herself and the grantee. The bill was filed against the grantor and her husband, praying that this annuity might be deemed a valid charge on her separate estate. On the part of the defendants it was argued, that it was a mere personal annuity, and not a charge on lands, and that a demand of a personal nature was not a lien on her separate estate. But Lord Manners, Chancellor, considered the deed of annuity, because it recited her power

<sup>d</sup> 9 Ver. 369.

<sup>e</sup> Ball & Beatty's Cases in Chan. temp. Ld. Manners, 49.

over her separate property, as a charge upon it, and decreed accordingly.

Now, although there is but one of these cases, viz. *Grigby v. Cox*,<sup>f</sup> which expressly establishes that a *feme covert*, having a power to appoint her separate estate, without any form of disposition being prescribed, may appoint in any form in which she pleases, (each of the other cases only ascertaining some particular form to be sufficient under this general power,) yet the effect of all of them, united, is, to prove that a married woman, having separate property with such a power, has the complete dominion over it to the extent of her interest in it, and may dispose of that interest by any form of instrument in which she thinks fit.

<sup>f</sup> 2 Ves. sen. 517.

## CHAP. VI.

## OF THE POWER OF MARRIED WOMEN OVER THEIR SEPARATE PROPERTY, WHERE IT IS LIMITED TO THEM WITH A PRESCRIBED FORM OF APPOINTMENT.

Trust to a *feme covert* for her separate use, with a power to appoint by will or writing under her hand, she may dispose of it in any form.

If there be a trust for the separate use of a *feme covert*, with a power to her to appoint, but without any particular form of appointment being prescribed, it appears that equity will so far consider her to have the absolute control over the subject of the trust, as to uphold and enforce a disposition of it by her in any form in which she intimates an intention to that effect. But when the trust is for the separate use of a married woman, with a power to her to appoint, in a particular form, much discussion has arisen, whether she can, in any, and in what cases, deviate from that form. And this much appears to be settled on the subject, that, where the trust is to the *feme covert* for her separate use, without any limitation as to the duration of the estate, with a power to her to appoint, by will or writing under her hand, she is held to be the complete owner of the trust fund, and to be enabled to dispose of it by any form of instrument during her lifetime. As in *Elton v. Shepherd*,<sup>a</sup> where a sum of 2000*l.* was bequeathed to the separate use of a married woman, with a power to her to give and dispose of the said sum "as she should, by any will or writing under her hand, direct and appoint," his Honour, Sir Thomas Sewel, was of opinion, that the trust to pay to the legatee for her separate use being unaccompanied by words limiting the duration of the trust, gave her the absolute interest, and that the subsequent words giving her the power of appointment were merely an anxious ex-

<sup>a</sup> 1 Br. C. C. 532.

pression of the intention of the testatrix that she should have an uncontrollable power of disposing of the fund.

And though the trust for the separate use of the married woman should be for a limited period, as for her life, yet if a general power of appointment of the entire fund be annexed to the gift, as by deed or will, that would give her a power of disposition, in any way and at any time. In *Frederick v. Hartwell*,<sup>b</sup> Mary Mervyn had bequeathed 5000*l.* stock to trustees, "in trust, to permit Anne Frederick to receive the dividends and produce thereof during her life, separate and apart from her present or any future husband ; and, after her death, on trust, as to the capital, to and for the use of such person or persons to whom the said Anne should, by deed or will duly executed, give, assign, or appoint the same, notwithstanding her coverture ; and, in default of such disposal, on trust for the legal representatives of the said Anne, in a course<sup>c</sup> of administration." Mr. Frederick and his wife Anne filed a bill, stating her wish, that the legacy should be transferred to her husband, and that she had by deed appointed it to him, and praying a transfer accordingly. His Honour, Sir Lloyd Kenyon, decreed that it should be so. Now, as the wife had the power of appointing by deed or will, it might appear that her appointment was, in this case, in strict compliance with the testatrix's direction ; however, it is to be observed, that no appointment by her was to have operation during her life, as the trustees were directed to convey after her death only ; and, therefore, his Honour must have been of opinion, that the legatee took the absolute property in the entire sum. So, in *Barford v. Street*,<sup>c</sup> where there was a devise of real and personal estate, in trust to pay the rents and profits to Mary Barford during her life, for her separate use, independent of any husband she might marry ; and from and after her decease, in trust to convey that estate to and amongst such persons, &c. &c. as Mary Barford, in her lifetime, whether married or single, should from time to

Money vested in trust, to permit feme covert to receive the dividends during her life for sole use, and after her death, as to the capital for the use of such persons as she should appoint by deed or will, and in default of appointment to her executors, allowed to transfer it to her husband on their joint bill filed for that purpose.

Devise of real and personal estate for life for separate use, and after her decease, in trust to

<sup>b</sup> 1 Cox's Rep. 193.

<sup>c</sup> 16 Ves. 135.

convey by any deed or deeds, &c. she has an absolute power over it.

time, by any deed or deeds, writing or writings, executed by her and duly attested, or by her last will and testament in writing, &c. limit and appoint. Upon a bill filed by Mary Barford against her trustee, praying a declaration, that she was entitled to the real and personal estate, and that they should be conveyed to her and her heirs; the Master of the Rolls decreed the trustee to convey the legal fee to the plaintiff, saying, that an estate for life, with an unqualified power of appointing the inheritance, comprehends every thing. Now, although this is not the case of separate estate to a married woman, yet it is obvious that, if Mary Barford had married, and she and her husband had filed their bills to the same effect, the Master of the Rolls would have been of the same opinion as to the quantity of her estate, and her power over it.

Limitation for sole and separate use of a married woman indefinitely, with a general power of appointment annexed, and for life only with similar power, give the entire property.

So that this much may be now considered to be settled, that if there be a limitation to the separate use of a married woman, either indefinitely with a general power of appointment superadded, or else for her life only, with a similar power, that, in either instance, she takes the property in the entire of the thing limited. But then a difference must be observed between these two classes of cases; for, in the former, namely, where there is no period fixed for the duration of the estate for separate use, the married woman has the sole and separate property in the entire of it, and may dispose of it as she pleases independently of the power annexed; while, in the latter, where the estate is given for her separate use for her life only, with the power to dispose of the remainder, though she has the property in the entire, yet she has a separate property only in her life estate, and she takes the remainder not to her separate use, but by virtue of the power, and as she would take any other property, subject to the claims of her husband upon it.

Limitation to a feme covert indefinitely for her separate use, with a

It has also been decided, that where the limitation is to a *feme covert* for her separate use indefinitely, with power to appoint by will, and in default of such appointment, then to her executors, she has the complete dominion over the thing limited, and may appoint by any form of instrument

during his lifetime, although the power of appointing be confined to one form, namely, a will ; and this was the case in *Newman v. Cartony*,<sup>d</sup> where a legacy given on such trusts to a married woman, with a power to appoint by will, and in default to her executors, was ordered to be paid to her husband on her consent : and so the law has been long settled with respect to all indefinite limitations (not for separate use only) with a power to appoint by will.<sup>e</sup> However, the authority of the cases deciding that a married woman may give to her husband money vested in trustees for her separate use, with a power to appoint by will, by an instrument different from that prescribed by the settlement, has been denied by Lord Alvanley in *Socket v. Wray*,<sup>f</sup> where he expressly overruled *Newman v. Cartony*,<sup>g</sup> *Ellis v. Atkinson*,<sup>h</sup> and *Pybus v. Smith*.<sup>i</sup> The trust in *Socket v. Wray* was, that the trustees should, from time to time, during the life of Catherine Socket, pay over the dividends to the proper hands of the said Catherine for her sole, absolute, peculiar, and separate use and benefit, or to such person or persons as she, by any note, instrument, or writing, to be by her signed, notwithstanding her present coverture, should direct or appoint ; and that they should transfer the principal sum to such person, &c. as the said Catherine, by herself alone, whether sole or covert, should at any time during her life, by her last will, or by any writing purporting to be her last will, &c. &c. appoint ; and in default of such appointment, then in trust for her executors or administrators, for their own use and benefit. The bill was filed by Socket and his wife against the trustees, praying that they should be obliged to sell the funds, and pay over the produce to the plaintiffs, insisting that as Catherine Socket was entitled to the dividends for her life, for her sole use, and as she had the power of disposing of the capital, the trustees could not be prejudiced by transferring the same, the plaintiff

power to appoint by will, and in default of appointment to her executors, gives the complete dominion over it.

<sup>d</sup> Cited in *Pybus v. Smith*, 3 Br. C. C. 346.

<sup>e</sup> *Robinson v. Dugate*, 2 Vern. 181. *Maskelyne v. Maskelyne*, Amb. 750.

<sup>f</sup> 4 Br. C. C. 483.

<sup>g</sup> In the notes to *Pybus v. Smith*, 3 Br. C. C. 346.

<sup>h</sup> 3 Br. C. C. 565.

<sup>i</sup> 3 Br. C. C. 346.

Catherine being willing to consent in court. The trustees submitted to act as the Court should direct ; but the Master of the Rolls, Sir Pepper Arden, said, that Mrs. Socket was to have the interest during her life, but as to the principal, she could dispose of it only from time to time by a revocable act ; and his Honour added, that he should go too far if he held it disposable in any other way but by will ; and that notwithstanding *Newman v. Cartony*,<sup>j</sup> *Ellis v. Atkinson*,<sup>k</sup> and *Pybus v. Smith*, he thought she could not dispose of it by deed. This case seems to have been decided against the principle of all the authorities on the subject of the wife's separate estate.

If there had been a limitation of the same kind to an unmarried woman, there appears to be no doubt that it would have vested the absolute property in the entire fund in her, and would have enabled her to dispose of her interest in it by any form of conveyance suited to the purpose. The trust is, in the first place, for her, for her separate use for life, with a power of disposing of the principal by will, which, if it went no further, would certainly give her only a life estate, with a power of disposing by will alone ;<sup>l</sup> but then the instrument provides, that if she should not dispose of the principal by will, then it should be transferred to her executors or administrators for their own use and benefit ; and this ultimate limitation to her executors or administrators, coupled with the preceding use for her life, is relied on as giving her the power of disposing of the principal in any form, although she was restricted to an appointment of it by will ; for if there be a limitation of a sum of money for the life of the donee, with remainder to his executors or administrators, the entire and absolute property of that money vests in the person to whom it is so limited.<sup>m</sup> In the case of *Anderson v. Dawson*,<sup>n</sup> Sir William Grant states the difference between a limitation to executors or admi-

A limitation of a sum of money for life, with remainder to the executors and administrators

<sup>j</sup> In the notes to *Pybus v. Smith*, 3 Br. C. C. 346.

<sup>k</sup> 3 Br. C. C. 563.

<sup>l</sup> *Reid v. Shergold*, 10 Ves. 370.

<sup>m</sup> *Bradley v. Peixoto*, 3 Ves. 324.

<sup>n</sup> 15 Ves. 530.



nistrators, and a limitation to the next of kin, to be this, that the former was, as to personal property, the same as a limitation to the right heirs as to real estate, but that a limitation to the next of kin was like a limitation to heirs of a particular description, which would not give the ancestor, having a particular estate, the whole property in the land : so that under the authority of this opinion on the effect of a limitation to executors or administrators, it may be laid down that a person to whom a previous interest for life has been given with such a remainder, takes the whole interest absolutely, and may dispose of it as he likes. This also is certain, that if there be a gift of any kind attended by a condition restrictive of the power of alienation, such condition would be void, because it is inconsistent with the absolute gift :<sup>o</sup> And both these points, namely, as to the effect of a limitation to executors or administrators, and with respect to a condition inconsistent with an absolute gift, were decided by Sir Pepper Arden in *Bradley v. Peixoto*,<sup>p</sup> where a father had bequeathed the dividends of stock to his son for the term of his life, but at his (the son's) decease, the said stock, principal and interest, to devolve to his heirs, executors, administrators and assigns ; but that if he should attempt to dispose of any part of the stock during his lifetime, that then he should forfeit all benefit under the will. His Honour, the Master of the Rolls, declared, that this was a gift with a qualification inconsistent with the gift, and that the qualification ought to be rejected. Now, in *Socket v. Wray*,<sup>q</sup> the limitation was to Mrs. Socket, for her separate use for her life, with a power to dispose of the principal sum by will, and if she should not dispose of it by will, then to her executors or administrators. Here then was an absolute gift to Mrs. Socket, and if the power given to her of disposing of it by will, was intended as a restriction to that particular mode of conveyance, then under the authority of *Bradley v. Peixoto*,<sup>r</sup> that condition was void. But his Honour observed, on this latter occasion, that it was

of donee, gives the absolute property : Difference between a limitation to executors or administrators, and limitation to next of kin.

<sup>o</sup> Co. Lit. 223 a.  
p 3 Ves. 325.

<sup>q</sup> 3 Br. C. C. 483.  
3 Ves. 325.

unlike the case of *Socket v. Wray*, (which had been decided by himself,) for that in that case there was a gift to a *feme covert* for life, and then to such uses as she should by will appoint; and, he said, that he had declared in determining that case, that she could appoint only by will, and could not bind her executors by any deed in her lifetime; but that he should have thought otherwise in the case of a man or any person having an absolute interest. In this case of *Socket v. Wray*, the question was not what power Mrs. Socket had over her separate estate, she having only an estate for life to her separate use, as to her power of disposal of which there was no doubt; but the question was, whether she had such a property in the principal sum under the settlement as would enable her to give it to her husband by her consent in court; and Sir P. Arden thought that she could not, as her power was confined to a disposition by will; and certainly, if the limitation had been to her for life, with a power to her to dispose of the remainder by will, without any limitation to her executors, it is clear, from the reasoning of Sir W. Grant, in *Richards v. Chambers*,<sup>a</sup> that she could not have parted with her interest to her husband during her lifetime: but then it is apprehended that the limitation to the executors of Mrs. S. would take the case out of the principle of *Richards v. Chambers*: Indeed, Sir William Grant, in pronouncing his judgment in *Anderson v. Dawson*,<sup>t</sup> said, that the question in *Socket v. Wray* did not turn upon the quantum of interest given by that limitation to executors or administrators; but the objection was, that be it what it might, Mrs. Socket could not, while a *feme covert*, make any disposition, except in the precise mode appointed by the settlement; so that the principle which Sir Pepper Arden intended to establish by his decision in *Socket v. Wray* was this, that wherever property was limited to a married woman in terms, which, if she were sole, would give her the entire interest, and such limitation was accompanied by any restriction as to the mode of disposing of the fund, that such clause having been introduced

<sup>a</sup> 10 Ves. 580.

<sup>t</sup> 15 Ves. 538.

with a view to protect her against her husband during the coverture, ought not to be dispensed with. However, without presuming to question the soundness of this principle, it is submitted that it is directly at variance with the doctrine laid down in some prior leading cases on the subject, and that it has not been followed in any subsequent case. *Newman v. Cartony*,<sup>u</sup> which was prior to *Socket v. Wray*, has been already noticed; there a legacy had been given to a married woman for her sole use, with a power of appointment by will, and in default of appointment, to her executors, and the Court ordered the legacy to be given to the husband on her consent. This case was stated by Sir P. Arden, in his judgment in *Socket v. Wray*, to be directly in point, and was expressly overruled by his Honour. In *Hulme v. Tenant*,<sup>v</sup> the trust was created, in a marriage settlement, of leasehold and freehold lands, to pay the rents and profits to the wife for her separate use, and to convey the estate itself to such uses as she should appoint by will or deed executed in the presence of two witnesses, and in default of such appointment, to the use and behoof of her heirs and assigns; and it was held, that her engagement in writing to pay the debt of her husband was a sufficient appointment by her as to the leasehold lands: and these two cases were so decided, on the ground that a *feme covert* was a *feme sole* as to her separate estate. So in *Pybus v. Smith*, where the lands of the wife were vested in trustees on trust, to permit Mrs. Vernon to receive the rents and profits, or to pay them to such persons, in such proportions, and for such uses, as she should, by any deed or writing under her hand from time to time appoint; and in default of such appointment, to her sole and separate use for life, she by deed poll appointed the rents and profits to be paid to her husband by the trustees, and also appointed to him her reversion in fee, which she had a power of doing by the settlement. The question made in the cause was, whether she could make a sweep-

<sup>u</sup> In the notes to *Pybus v. Smith*, v. 1 Br. C. C. 16.  
3 Br. C. C. 346.

ing appointment of the rents and profits, her power being only to appoint "from time to time?" and the Chancellor, Lord Thurlow, held, that the settlement giving her separate estate made her a *feme sole* as to that, and that the words "from time to time," did not restrict or limit her powers over it. And several other decisions have been made on the same words on the authority of *Pybus v. Smith*.<sup>w</sup>

However, *Socket v. Wray* seems to have been silently overruled in *Henry v. Thomas*,<sup>x</sup> where, although the limitations were not exactly similar, Sir William Grant held, that a married woman, to whom money was limited for her sole use during coverture, with a power to dispose of it by will, might charge it by bond. The facts of the case were these: by indentures of settlement previous to the marriage of *William Johnson* and *Sarah Smith*, widow, a sum of 2000*l.* and an annuity to which Mrs. Smith was entitled, were vested in trustees for the sole and separate use and benefit of the said Mrs. Smith, during her coverture between her and the said William Johnson, and it was declared and agreed that it should be lawful for the said Sarah Johnson, at any time during her said intended coverture, by her last will and testament in writing, or any writing purporting to be her last will, to be signed by her, and attested by two or more credible witnesses, to give or dispose of the said sum of 2000*l.* to such person or persons, and in such shares or proportions, manner and form, as she should think fit; and in default of such appointment, then, if she should die during the life of her husband, that it should go according to the statute of distributions. Mrs. Johnson afterwards executed a bond as a surety, and also, in the lifetime of her husband, made her will according to the settlement, and thereby gave, bequeathed, directed, limited and appointed, all her separate estate over which she had any disposing power, and appointed John Thomas and James Willes her executors. After the death of Mr. and Mrs. Johnson, the

<sup>w</sup> *Watts v. Dawkins*, 12 Ves. 501. <sup>x</sup> 15 Ves. 596.  
<sup>501.</sup> *Brown v. Like*, 14 Ves. 302.

person for whom she had executed her bond as a security became bankrupt, and a bill was filed by the obligee of the bond against the executors of Mrs. Johnson, the assignees of the bankrupt, and the executor of Mr. Johnson, praying that the estates of the principal in the bond, and of Mr. Johnson, and the separate estate of Mrs. Johnson, which she became absolutely entitled to for her separate use, should be declared liable to pay the principal and interest due by bond to the plaintiff. The Master of the Rolls said, that a doubt had occurred to him in this case, whether the bond could affect the separate property of Mrs. Johnson according to *Socket v. Wray*, as by the settlement she appeared to have no power of appointing except by will. The counsel for the plaintiff endeavoured to distinguish this case from *Socket v. Wray*, by stating the question there to be, Whether during the life of a married woman the Court could apply her separate property according to her engagement, and by saying (what was not the fact) that in the principal case Mrs. Johnson could have appointed by deed as well as by will, according to the terms of the settlement? The principal question argued in this case was, Whether the bond of the *feme covert*, during her coverture, could be considered a valid charge on her separate estate? and his Honour held, that it was a valid charge, although she had a power of appointing only by will.

It is remarkable, that on this occasion Sir William Grant expressed no opinion on the case of *Socket v. Wray*; all his Honour says on that subject is this, that Lord Alvanley did not consider a married woman, who had only a power of appointment by will, as having separate property; but his Honour cautiously abstained from giving his own opinion on that point; for he says, "if this was absolutely separate property in Mrs. Johnson, upon the plaintiff's construction of the deed, that takes it out of *Socket v. Wray*." However, his decree shows he was of opinion, that where a sum of money is vested in trustees for the separate use of a *feme covert* during coverture, with a power of appointing the principal, she may dispose of it in any form, though the

deed by which it is settled had pointed out a will as the only mode by which she could effect that purpose. The reason which governed his Honour was this, that the *whole* fund was in trust for Mrs. Johnson's separate use;<sup>y</sup> that she had the powers of a *feme sole* over it, which, according to the doctrine of Lord Thurlow in *Pybus v. Smith*, could not be curtailed by the subsequent restriction to an appointment by will. And this must also have been the reason, that the limitation over to the next of kin of Mrs. Johnson could not prevent her alienation, because, the entire property being limited to her separate use, she had it in her power to disappoint the remainder to her next of kin, in any way that she pleased. The distinction between *Socket v. Wray*, and *Heatly v. Thomas*, is, that in the former the limitation was for life only, with a power to alienate by will, and, in default of appointment, then to executors; and, in the latter, the whole fund was given indefinitely with the same power, and, in default of appointment, then to next of kin. And Sir William Grant gladly fastened on this distinction for the purpose of coming to a different conclusion from Lord Alvanley, although it is evident that the circumstances of the whole fund having been given indefinitely, would have made no difference in his Lordship's decision, as he expressly overruled *Newman v. Cartony*,<sup>z</sup> in which that fact was to be found.

Limitation to a married woman for separate use for life, with a power to dispose of the remainder by will, she can dispose only by will.

But where there is an express estate for life given for the separate use of a married woman, with a power to dispose of the remainder by will, she can dispose only by will. As in *Reid v. Shergoold*,<sup>a</sup> where such a limitation was held to give an estate for life only, with a power which must be executed. So, too, in *Bradley v. Westcott*,<sup>b</sup> which was not a case of separate estate, where testator bequeathed money, &c. to his wife for life, with a power to appoint by will, and in default of appointment then over;

<sup>y</sup> See Sir Wm. Grant's judgment in *Lee v. Muggeridge*, 1 Ves. & B. 123.

<sup>z</sup> Cited in *Pybus v. Smith*, 3 Br. C. C. 346.

<sup>a</sup> 10 Ves. 370.

<sup>b</sup> 13 Ves. 445.

it was held, that the wife had but an estate for life, with a power of appointment. In like manner, if there be a limitation to a *feme covert* for her separate use for her life, and after her death for her intended husband for life, with a power to her to appoint by will, and in default of appointment, then after the death of her husband to her next of kin; this gives only an estate for life, with a power to appoint by will. As in *Anderson v. Dawson*,<sup>c</sup> where Sophia Hales, previous to her marriage with Thomas Brown, covenanted to transfer immediately a sum of money to trustees in trust for her sole use during her life, and after her death in trust for her husband, and after the death of the survivor of them, then in trust to pay the capital sum to such person, &c. &c. as the said Sophia should, notwithstanding her coverture, and whether covert or not, by her last will and testament in writing, or by a writing in the nature of her will, direct or appoint; and in default of such appointment, and if her said intended husband should be then dead, then in trust for the next of kin of the said Sophia, their executors, &c. Mrs. Brown married a second time, and after the death of her second husband she filed a bill, praying, that under the trusts of the settlement she might be declared absolutely entitled to the money so settled, and that she might dispose of it in her lifetime: but the Master of the Rolls dismissed the bill, saying, that the bill could be supported only on the assumption that the plaintiff had the absolute property in the fund, and was not merely entitled for life, with a power of disposition by will. His Honour said, that to make out that, it must be shown that the ultimate limitation to her next of kin was either wholly inoperative, or was in effect a limitation to herself; but that there was a great difference between a limitation to executors and administrators, and a limitation to the next of kin. That the former is, as to personal property, the same as a limitation to the right heirs as to real estate; but that a limitation to the next of kin is like a limitation

Limitation to a feme covert for separate use for life, remainder for her intended husband, with a power to appoint by will, and in default of appointment, then after death of husband to her next of kin, she can dispose by will only.

<sup>c</sup> 15 Ves. 532.



to heirs of a particular description, which would not give the ancestor, having a particular estate, the whole property in the land. His Honour therefore held, that she had but an estate for her life, with a power to dispose of the principal by her will.

A limitation in trust for separate use for life, and if she die during the coverture, then that they should transfer as she should appoint by will; but if she should survive, then to transfer to her and her assigns, prevents an alienation during coverture.

A limitation for separate use for life, and if she should survive her husband, then to her absolutely; but if she should die in his lifetime, then according to her appointment by deed or

If the intention be that a *feme covert* shall have a separate use for her life in any property, and that she shall have the absolute property in the fund, in the event of her surviving her husband, without the possibility of her alienating it during the coverture, the mode of framing such a settlement would be by vesting it in trustees for her separate use during her life, with directions that if she should die during the coverture, then that they should transfer according to her appointment by will; but that if she should survive, that then they should transfer to her or to her assigns.<sup>d</sup> The settlement in *Richards v. Chambers*,<sup>e</sup> would have the same effect. In that case, the trust was for the separate use of the wife for her life, and if she should survive her husband, then to her absolutely; but if she should die in his lifetime, then to such persons as she by deed or will should appoint, and in default of appointment, to her executors and administrators. There was a part of the property in court in trust in this cause, and husband and wife applied by petition to have it transferred to them. She had executed an appointment in her husband's favour, and having been examined *de bene esse*, expressed her consent and desire that the prayer of the petition should be complied with; but the petition was dismissed, his Honour saying, that the wife could not give up, in the lifetime of her husband, the contingent interest which while *sui juris* she had secured to herself in the event of her surviving him. *Lee v. Muggeridge*<sup>f</sup> is a case of the same class; for there the trust was to the separate use of the wife for the joint lives of herself and her husband, and from the death of the husband, in case she should survive him, to her heirs or

<sup>d</sup> See Sir W. Grant's judgment in *Anderson v. Dawson*, 15 Ves. 538.

<sup>e</sup> 10 Ves. 580.  
<sup>f</sup> 1 Ves. & Beam, 118.



assigns, with a power to her to appoint by will if she should die in her husband's lifetime ; and in default thereof, then over.

will, and  
in default  
of appoint-  
ment, to  
her execu-

tors and administrators, prevents a disposition during coverture. A limitation for separate use of wife during joint lives of herself and her husband, and from the death of husband, in case she should survive, to her heirs and assigns, with a power to her to appoint by will, if she should die in his lifetime, and in default thereof, then over, prevents a disposition during coverture.

The son of Mrs. Muggeridge by a former husband, being in embarrassed circumstances, she, in order to induce his father-in-law, the plaintiff, to relieve him, proposed by letter to become security to the extent of 2000*l.*, by a bond payable at her death. The plaintiff, accordingly, lent the money to her son, and Mrs. Muggeridge, by her bond dated the 4th August, 1789, became bound to the plaintiff, with condition that the heirs, executors, or administrators of Mrs. Muggeridge, should, within six months after her decease, pay to the plaintiff 1919*l.* 19*s.* with such part of the interest as Joseph Hiller (her son) should omit to pay, it being agreed that he should pay the interest half yearly. Hiller having neglected to pay the interest, the plaintiff, in 1804, wrote to Mrs. Muggeridge requesting payment of the arrears, to which she, after her husband's death, returned an answer, stating, that it was not in her power to pay the bond off, and that it would be settled by her executors. Mrs. Muggeridge died in 1811. The bill was filed by the obligee of the bond against the devisee and executors of Mrs. Muggeridge, praying that it might be declared a charge on, and be paid out of, her separate estate.

His Honour dismissed the bill on the authority of *Richards v. Chambers*,<sup>g</sup> observing, that the express provision that, in the event of the wife surviving, the property should be absolutely hers, implied an exclusion of a power of so appointing it during the coverture. His Honour also said, that if she had done any thing that sets up the bond, or there had been a new contract, her assets would be liable, but that he could not now decree an account against them.

## CHAP. VII.

OF THE DISPOSITION BY MARRIED WOMEN OF THEIR SEPARATE PROPERTY, WHICH HAS BEEN LIMITED TO THEM WITHOUT ANY EXPRESS POWER TO APPOINT.

THE decisions on the subject of trusts for the separate use of married women, with a power of disposition annexed in a prescribed form, and where such power is given without any restriction as to the form of the appointment, have been stated in the last two chapters. There is another class of cases relating to trusts for separate use, where no power of disposition has been expressly given, which shall be the subject of the present chapter. And it is now well settled, that when a *feme covert* has a separate estate, she may dispose of it, in any form, to the extent of her interest in it, though no power of appointment be given to her, provided the instrument containing the trust has no express words of restriction in it.

Married woman, to whom personal estate is limited for separate use, without an express power of disposition, may dispose by will.

In *Fettiplace v. Gorges*,<sup>a</sup> the question was, whether, where a *feme covert* has a personal estate to her separate use, without any power of appointment being given to her, she could dispose of it by will? The facts were these: Mrs. Fettiplace, having two sums amounting to 2900*l.* vested in trustees to her separate use without any power of appointment, bequeathed them to her niece, Diana Gorges. The plaintiff, Fettiplace, the husband of testatrix, claimed these sums, in a bill filed against the legatee. It was contended for the plaintiff, that his wife had no power of disposing of this money by will, although she might have done so by any act in her lifetime; but that where it remained her property at her death, it was the

<sup>a</sup> 1 Ves. jun. 46. 3 Br. C. C. 8.

common right of the husband that he should enjoy it : for that being given to her separate use merely, nothing more could be inferred, than that it should not be subject to his debts. But the court held, that, from the moment a married woman takes property to her separate use, she has the sole and separate right to dispose of it, and also of the savings out of it.

In *Rich v. Cockel*,<sup>b</sup> too, where the instrument had only expressed a trust for her separate use, without adding any power of disposition by deed, will, or other writing, Lord Eldon said, that the nature of that interest was now well settled, that the trust being for her separate use, she should be enabled to dispose of it by will, if she thought proper, as incident to such an interest, though a will was not alluded to. And although a married woman cannot, in the contemplation of law, make a valid will, however, if she executes an instrument purporting to be a will of her separate property, a court of equity will treat it as a will, and require it to be proved in the Ecclesiastical Court before it will pronounce upon it, and the Ecclesiastical Court will grant probate of it without the assent of the husband ; yet, if the will had been made by her in execution of a power, and not by virtue of her separate property, probate of it could not be granted, unless the husband be first examined as to his consent.<sup>c</sup> So, in *Wagstaff v. Smith*,<sup>d</sup> it was held, that a trust to the separate use of a married woman, without any power given to her to appoint, enabled her to assign her separate estate to secure an annuity jointly with her husband. The trust was created by will, and the words of it were : “ to permit and suffer my dear sister Sarah Roberts to take or receive the interest or dividends of 750*l.* to her own use during her life, independent of her husband Daniel Roberts, or of any future husband she may hereafter marry.” After the death of the testator, Roberts and his wife agreed to grant an annuity

Married woman having separate estate, may dispose by will, though no power of appointment be expressly given to her.

Will of married woman, when made of her separate property, probate of it will be granted without consent of husband.

Probate will not be granted of will of married woman without consent of husband, if made in execution of a power.

Wife having sepa-

<sup>b</sup> 9 Ves. 369.

<sup>c</sup> Henly v. Philips, 2 Atk. 49.

Ross v. Ewer, 3 Atk. 160. Rich

v. Cockel, 9 Ves. 380.

<sup>d</sup> 9 Ves. 520.

rate estate without express power to dispose of it, may assign it as a security for an annuity granted by her husband.

The effect of the words "to pay" into the hands of *feme covert* for separate use.

to the plaintiff during the life of Sarah, for securing which Daniel Roberts gave his bond and warrant of attorney, and Sarah agreed to assign her life interest for the same purpose. An indenture of assignment was accordingly executed, but the trustee refused to pay the dividends, for which a bill was filed against him, and against Roberts and his wife. Roberts and wife, by their answer, did not refuse, but Smith the trustee did, on the ground that Mrs. Roberts was a *feme covert*. For the defendants, Roberts and wife, it was contended, that the direction to permit her to take the interest and dividends during her life, she not having a power of appointment, did not imply a power to assign them, but rather that she should take them from time to time as they should become due. The Master of the Rolls said, that the only question in the case was, whether Mrs. Roberts had the absolute property in the dividends during her life to her separate use? If she had, then she had a right to make any disposition of them that she thought fit. That there were many cases in which the question was, whether the absolute property, including a power of disposition, was intended to be given, or whether it was a personal gift without a power of disposition? That, when the Court has seen that it was the intention to limit merely a personal gift without any such power, there it has said, that such condition might be imposed, and that it would not render effectual an interest inconsistent with that condition. And his Honour mentioned the case of *Hovey v. Blakeman*, (which was heard before him on a petition,) where the trust was to *pay* the rents, profits, and interest to arise from the fourth part of the residue, in equal divisions, into the respective proper hands of the testator's two sisters, so long as they should live, the same to be to their separate use. He said, that he dismissed the petition of annuitant under a grant from one of the sisters, thinking that, as the trust was expressed, it was not intended to give an absolute property to them, so as to give a power of disposition; but that it was a personal bequest to them, to be paid into their respective proper hands. But the

present case, he said, was very different; that here were no words of control or restriction. That the trustees are not even "to pay," from time to time, into her hands upon her receipt, but she is "to receive," the very words to give an absolute property. That if land were given to trustees in these terms, it would be an use executed. His Honour accordingly decreed as the bill prayed.

Indeed, Lord Hardwicke does not seem to have inferred the same meaning from the words "to pay," that Sir William Grant did in *Hovey v. Blakeman*;<sup>e</sup> for, in *Caverly v. Dudley*,<sup>f</sup> where the same words occurred in a bequest to a married woman, his Lordship thought the testatrix intended to restrain the legatee from anticipating the produce of her separate estate, but that these words were not strong enough for that purpose, and that language expressive of that intent ought to have been introduced. There, Lady Catherine Howard, by her will, gave the residue of her estate, real and personal, to Mr. Biscoe, in trust to pay the produce to the defendant, Lady Dudley, for life, for her separate use, exclusive of her husband, with remainder over. Lady Dudley, after the death of the testatrix, wanting money, by deed of appointment, in consideration of 120*l.* paid by the plaintiff, granted him an annuity of 20*l.* during her life. The trustee refused to pay the annuity to the plaintiff, alleging, that by the will, the produce of Lady Howard's estate was to be paid to Lady Dudley herself, and to no other person. The bill was filed by the annuitant, praying that the arrears should be secured, and that the trustee should be restrained from making future payments to Lady Dudley. Lord Hardwicke said, "I am of opinion, it was not the intention of the testatrix that Lady Dudley should anticipate the produce of her estate by raising money upon it, and words should have been thrown in to restrain her from doing it; but as there are no such words, she might contract for raising a sum of money by way of loan, but not by way of annuity for her own life, as

Effect of  
the words  
"to pay"  
to *feme co-*  
*vert* for se-  
parate use.

<sup>e</sup> Cited in *Wagstaff v. Smith*. 9 Ves. 520.

<sup>f</sup> 3 Atk. 541.

it is too large an anticipation. His Lordship, therefore, gave Lady Dudley leave to redeem the annuity out of the produce, though made irredeemable.

In this case, Lord Hardwicke is of the same opinion with Sir William Grant, that a trust "to pay" into the hands of a *feme covert*, for her sole use, do not give her absolute property, his Lordship thinking, that they intimated an intention in the person using them, that she should not anticipate the income; but, then, he so far differed from his Honour, as to be of opinion, that the words do not amount to a total restriction, and, therefore, he allowed her to raise money by way of loan, though not by way of annuity. Now, it is to be supposed, that if the testatrix intended to restrain an anticipation of income by way of annuity, her restriction would have extended to a loan also; and, therefore, it seems strange, that the legatee should be allowed to anticipate in one way, and not in the other. Indeed, Lord Eldon seems to attach no great weight to this case; for, in his judgment, in *Jones v. Harris*,<sup>s</sup> he says of it, "As to *Caverley v. Dudley*, if I am to decide on such grounds, I may decide just what I please. The Lord Chancellor appears to have altered the contract against the very principle he states as the principle of the judgment, and made the plaintiff take the benefit of a contract which he neither intended nor had entered into, but which the Court says should have been the only contract. I disclaim any such power."

A trust  
"to pay"  
into the  
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It would appear, from the language of Sir William Grant, in the above case of *Wagstaff v. Smith*,<sup>b</sup> that a trust to the separate use of a married woman, without a power of disposition expressed, does not, in itself, imply an intention that she should not have the absolute property, but that the intention of the person creating the trust is to be collected from the terms used in pointing out the mode in which the trust is to be discharged, if any such be introduced. If the trust be "to pay" into the hands of the *feme covert*, this, his Honour thought, would be a restriction on her power of

alienation ; but if she were to "receive," this amounts to an intimation that she shall have an uncontrolled power over the gift. However, it is apprehended that at the present day it would make no difference in the extent of a married woman's power in the disposition of her separate property, whether the trust be expressed to be "to pay" into her hands, or "to permit and suffer her to receive," and that either phrase would confer the free power of disposal upon her.<sup>i</sup>

ried woman, or "to permit her to receive" for her separate use, equally empowers her to dispose of the fund as she pleases.

And accordingly there is a subsequent decision by his Honour Sir William Grant on the very same words, "to pay" into the hands of a *feme covert* for separate use, which, contrary to *Hovey v. Blakeman*, gives the absolute property to the *cestui que trust*. That is the case of *Sturges v. Corp*,<sup>j</sup> where it was held that a *feme covert* was to be considered a *feme sole* with respect to her reversionary property settled to her separate use, as well as to her property in possession, although no power of appointment was given by the instrument creating the trust. In this case, 4000*l.* was vested in trustees, in trust to pay the dividend to Anne Sturges and her assigns, during her life, as the same should from time to time become payable; and after her decease in trust "to pay" and apply the dividends and annual profits into the proper hands of Martha Sturges, (the married woman,) for her sole and separate use, for and during the term of her natural life, and not to be subject to the debts, control, or engagements of her husband, and for which the receipt of Martha Sturges alone, notwithstanding her coverture, should be a good and sufficient discharge; and from and after the deaths of Anne and Martha, then to transfer the said sum, and all dividends and proceeds, to Joseph Sturges the younger. Joseph Sturges the elder, the husband of Martha, purchased from his son Joseph the younger his reversionary interest in this sum of money, and then Joseph the elder and Martha his wife put up their reversionary interests in it to sale by auction, Anne Sturges being still

i See Sugden on Powers, 114.

j 13 Ves. 190.

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alive. The defendant was declared the purchaser, but he refused to complete the purchase, and on a bill being filed against him, praying a specific performance, he objected by his answer that a proper assignment of the reversion could not be made without the private examination of Martha Sturges, who was a married woman, and who ought to give her consent to the assignment in Court. But his Honour held, that where property is settled to the separate use of a married woman, examination is not necessary; that is only of use to part with an equity. That the principle is, that as to that property, she is a *feme sole*, and has a disposing power, as such, as much over her reversionary interest as over her interest in possession. And this case not only decided that a married woman can alienate her separate estate without any express authority having been given to her for that purpose, but it also establishes that an appointment of it by her is valid, without any consent or examination in Court; although Sir Thomas Sewell would never suffer a transfer to be made by the trustees of a married woman without an examination,<sup>k</sup> and Lord Thurlow had some difficulty upon the subject.<sup>l</sup>

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So in *Brown v. Like*,<sup>m</sup> it was held, that a *feme covert* to whom stock had been bequeathed for her separate use during her life, might grant an annuity out of it for that period, though no power of appointment was expressly reserved to her. The trust was "to permit and suffer" his niece, Anne Webster, to receive and take the residue after payment of an annuity to Elizabeth Coleman, and from and after Elizabeth Coleman's death, then the whole of the interest, dividends, and proceeds of the capital sum of 2100*l.* during the life of the said Sarah Webster, for her sole use and benefit, notwithstanding any husband she might happen to marry, and to pay the same into her own proper hands, for her own use and benefit, making her receipt a sufficient discharge, and declaring that no part should be liable to her husband's debts. Sarah Webster married Alexander

<sup>k</sup> 4 Ves. 143.  
<sup>l</sup> 3 Br. C. C. 346.

<sup>m</sup> 14 Ves. 302.



Elder, and joined him in granting an annuity of 20*l.* out of her separate property. A bill was filed against the trustees, praying that they might be obliged to pay the plaintiff, Brown, 20*l.* *per annum* out of the dividends of the stock vested in them during her life. One of the questions in the case was, whether Mrs. Elder had a sweeping power of appointment; but it was given up without argument, and admitted that she had.

*Essex v. Atkins*<sup>n</sup> established the grant of an annuity by a married woman out of separate property bequeathed to her before marriage, not subject to the debts or engagements of any after-taken husband, where no power of appointment was given. It appeared in the case, that the trustee had given notice to the plaintiff previous to his purchase of the annuity, that he never would pay it; however, his Honour held, that the consent of the trustees was not necessary to the validity of a disposition of her separate property by a *feme covert*, unless it be required by the instrument giving that property to her, and he confirmed the grant of the annuity by Mrs. Atkins, on the principle that she was a *feme sole* as to such estate. In *Dalbiac v. Dalbiac*,<sup>o</sup> where the trust was to a *feme covert*, for her separate use, without a power of appointment, and after her decease to her children by her then husband, and, if no children, then to her executors and administrators, she executed a bond for the debt of her husband, and, also, a deed, declaring, that her trustees should stand possessed of her separate property, in trust during her life, to pay the interest of the sum secured by her bond. These instruments were decreed to be delivered up, on a bill having been filed by her against the trustees for that purpose. However, this decree was not pronounced on the ground that Mrs. Dalbiac was not competent to execute these instruments, but because it was proved in the cause, that one of the trustees had misconducted himself, and that she had been unduly prevailed on to give these securities. It appeared, that the trustees, in whom the stock had been in

Grant of annuity by feme covert, having separate estate, without express power of appointment, valid.

the first instance vested in trust to pay the plaintiff the interest for her life, having refused to pay to the defendant, Dalbiac, the interest of a sum of money due to him by the plaintiff's husband, a bill was filed to remove them, and to appoint new ones, on which occasion the defendant procured himself to be nominated, suppressing the fact that he was a creditor. After he was so appointed a trustee, Mrs. Dalbiac, the plaintiff, executed these instruments, the other trustee not having been consulted. In his answer to the present bill, the defendant admitted, that his object in becoming trustee was to be the better able to repay himself. And his Honour thought that, upon established principles, the defendant could not, after having suppressed the fact of his being a creditor, revert back to that character, and set up the debt which he had suppressed.

There are, however, two cases of trusts to the separate use of married women, to whom no power of appointment was given, and in which it was decreed, that appointments made by them could not be enforced. The cases are, *Whistler v. Newman*,<sup>p</sup> and *Mores v. Huish*.<sup>q</sup> In the former case, by settlement previous to the marriage of John Whistler and Deborah Williams, it was declared that the sum of 1200*l.* 3½ *per cent.* bank annuities, the property of Deborah Williams, which had been transferred to certain trustees, should stand, remain, and be in their name, for the purposes following, in trust for Deborah until her marriage, and from the marriage, then in trust, that the said trustees, and the survivor of them, should, from time to time, receive and take the interest, dividends, and profits thereof, and of every part thereof, as the same should become due and payable, and pay the same into the hands of her, Deborah Whistler, for and during her natural life, for her own sole, separate, personal, and peculiar use, so that the same should not be subject or liable to the debts, engagements, disposition, or control of the said John Whistler, during her then intended coverture, but that the receipt alone of the

said Deborah should, notwithstanding her said coverture, be a sufficient discharge for the same. There was also a life-interest given to John Whistler after the death of Deborah, with a power to her to appoint amongst the children of the marriage in such shares as she should think fit, but no power was given to her to dispose of her life estate. After the marriage, the trustees sold out the bank annuities at the importunity of husband and wife, and paid the money produced by the sale to the husband, who, in a few years afterwards, died insolvent. It was also proved in the cause, that the trustees, before they would sell, had taken a bond of indemnity from the husband, to which his wife was a subscribing witness, and with the object of which she was well acquainted. After the death of Whistler, the trustees replaced the stock, by purchasing 1200*l.* 3 *per cent.* bank annuities, the stock, in which the trust fund was formerly invested, having been reduced ; the bill was filed by the widow and children against one of the trustees, and the representatives of the other, praying that the amount of the dividends upon the 1200*l.* bank annuities from the time the trustees had transferred the same, and that the 1200*l.* bank annuities, purchased by the said trustees to replace the said trust annuities, may be transferred to the Accountant-General upon the trusts of the settlement. The defendants submitted that the wife was not entitled to call for the dividends, as the stock was sold out at her instance and request, and by her consent and direction, which she was competent to give, the dividends being to her separate use. As to the dividends due since the repurchase, they were claimed by the executors of one of the trustees during the life of Deborah Whistler, to reimburse his estate for what he had paid, and was liable to pay, on account of the repurchase. It was referred to the Master to inquire and report upon what authority the bank annuities had been sold ; and he reported, that the plaintiff and her husband had frequently applied to the trustees to let the husband have the money for his advancement in trade. However, it was decreed that they should

pay her the dividends from the time of her husband's death. The Lord Chancellor, Lord Rosslyn, distinguishing this case from those others which had been decided on the same subject, by saying, that, in the present case, the plaintiff was the wife complaining of the conduct of her trustees, which his Lordship considered as contrary to their duty ; that in all the other cases the trustees had been passive, but that in this they had been active, and had taken a most mischievous part. In *Mores v. Huish*,<sup>r</sup> freehold estates were vested in trustees upon trust to receive and take the rents, issues, and profits, yearly, and every year, and pay the same, when and as they were received, unto Anne, the wife of Thomas Taylor, or *otherwise in their discretion*, to permit her to receive the same, and *her assigns*, for and during her natural life, to and for her sole use and benefit, notwithstanding her then present, or any future coverture, her receipt alone to be a good and sufficient discharge for the same, to the intent and purpose that the same should not be subject or liable to the control, debts, or engagements of her then or any future husband, *but to be solely at her own disposal* ; and from and after her decease, then to her husband and his assigns, with remainder amongst the issue of the marriage, and in default of issue, then to the survivor of husband and wife. Taylor and his wife granted an annuity of 45*l.* to the plaintiff Mores, secured upon the said estates for the lives of Taylor and his wife, and the survivor, in consideration of 300*l.* Previous to the execution of the deeds, the solicitor for the plaintiff wrote to one of the trustees to know if Taylor and his wife could secure this annuity, to which the other trustee, viz. Huish, the defendant, answered (his co-trustee being dead) that Taylor and his wife could give no security ; that Taylor was idle and extravagant ; that if he was possessed of the whole fortune, his wife and children would soon come to the parish ; and that he (Huish) would never consent to any alienation of any part of this separate estate. However,

the plaintiff concluded the purchase, notwithstanding this caution from the trustee; and the defendant, Huish, afterwards refusing to pay the first quarter of the annuity, the plaintiff filed his bill against the trustee, and Taylor and his wife, praying that the annuity may be made good out of the rents and profits. It was insisted for the defendants, that their security could not be enforced. His Lordship expressed great doubt whether a trust to pay to the separate use of a married woman, rents and profits, from time to time, is a trust to pay by anticipation. The counsel for the plaintiff relied on *Pybus v. Smith*,<sup>s</sup> and *Ellis v. Atkinson*,<sup>t</sup> and observed, that the words "from time to time," do not occur in this case. The bill, however, was dismissed, with costs. The Lord Chancellor said, that in *Whistler v. Newman*,<sup>u</sup> he had made the trustees answer for a breach of trust, the subject being the interest of the wife for life; that the difference between *Pybus v. Smith* and the other cases, compared with the present case, is, that in those the wife had a power of appointment, but this is a mere trust to receive the rents and profits, and pay them, from time to time, to the separate use of the wife. That he must applaud the trustees, instead of condemning them, for not doing that, which, if they had done, would have involved them in a breach of trust.

These two decisions are quite contrary to the course of the authorities which were previous to them, and, accordingly, they have been overruled by the cases of *Wagstaff v. Smith*,<sup>v</sup> *Sturges v. Corp*,<sup>w</sup> *Essex v. Atkins*,<sup>x</sup> and the other subsequent cases, where it has been decided, that a trust to the separate use of a married woman, without a power of appointment, gives her the absolute property in the subject of the trust, so long as her interest therein continues. Indeed, so far as Lord Rosslyn was influenced in deciding *Whistler v. Newman*, and *Mores v. Huish*, by the absence

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<sup>s</sup> 3 Br. C. C. 340. 1 Ves. jun. 189.

<sup>t</sup> 3 Br. C. C. 347. in a note.

<sup>u</sup> 4 Ves. 129.

<sup>v</sup> 9 Ves. 920.

<sup>w</sup> 15 Ves. 190.

<sup>x</sup> 14 Ves. 542.

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of express powers of appointment to the *feme coverts*, that ground has been disregarded altogether in every succeeding case upon the subject, the Court holding, that the words "separate use" imply, from their nature, a power of appointment. Even where the trustee had purchased the wife's life separate estate in the name of a third person, and had misconducted himself grossly with respect to other objects of his trust, Lord Eldon held, that a sale by her, to him, to pay a debt due to him by her husband, was valid, and refused to relieve her; and on this ground, that in that court she was a *feme sole* as to her separate estate, and might dispose of it to whom, and as she thought proper; and that the circumstance of the trustee having joined in the conveyance, could not have rendered it less valid, as the Court would have ordered him to do so at her desire, if he had refused.<sup>y</sup> And the improvidence of the act by the wife, with respect to this kind of property, will not affect the validity of the transaction in which she disposes of it; as in *Essex v. Atkins*,<sup>z</sup> where, though the purchaser from the wife had notice from the trustees that the bargain was improvident, and would be ruinous, and that they would not pay him, yet Sir William Grant enforced the contract, saying, that upon the evidence she was a free agent, and that, accordingly, the Court had no choice, but must give effect to her engagement. And this decision overrules *Mores v. Huish*, (though not in express terms,) as the leading circumstances were similar in both. However, although such a contract will be enforced, it seems, that a purchaser, under such circumstances, would not meet with a very favourable reception from the Court, as the Master of the Rolls evinced his feelings upon the subject, by withholding the costs from the plaintiff, to whom he gave the relief he prayed.<sup>a</sup> And where a husband devised lands and money in trust, for the sole and separate use of his wife during her life, directing his trustees to pay, from time to time, the dividends, interest, and annual produce, into the hands of his

y *Parkes v. White*, 11 Ves. 209.  
z 14 Ves. 542.

a *Essex v. Atkins*, 4 Ves. 542.

said wife ; and also that the receipt of his wife alone, for what should be actually paid into her own hands, as aforesaid, for and in respect of the rents, &c. shall from time to time, notwithstanding her coverture, be a sufficient discharge to the trustees ; it was held, that this language was not intended to control that right of disposition which is incident to property.<sup>b</sup>

It therefore may be now considered as the settled law of our courts of equity, that wherever property has been given to the separate use of a married woman, the gift being unaccompanied by any power of appointment, she is so far to be treated as a *feme sole* in respect to it, that she may (as in cases where she has a power of appointment) dispose of it by will,<sup>c</sup> or by grant of an annuity out of it,<sup>d</sup> and that she may sell her reversionary interest in it.<sup>e</sup> And these cases also prove that a *feme covert*, having separate property, with or without an express power of appointment, may exercise her right of ownership over it without the consent of her trustees,<sup>f</sup> and even in opposition to them,<sup>g</sup> (unless the terms of the gift require their concurrence,) however improvident the transaction may be, provided it does not appear that she was coerced on the occasion, or that any fraud had been practised upon her.

<sup>b</sup> Acton v. White, 1 Sim. & Stu. 429.

<sup>c</sup> Fettyplace v. Gorges, 1 Ves. jun. 46. 3 Br. C. C. 8.

<sup>d</sup> Wagstaff v. Smith, 9 Ves. 920.  
Brown v. Like, 14 Ves. 302.

<sup>e</sup> Sturges v. Corp, 13 Ves. 190.

<sup>f</sup> Grigby v. Cox, 1 Ves. sen.

517.

<sup>g</sup> Essex v. Atkins, 14 Ves. 542.

## CHAP. VIII.

## OF LIMITATIONS TO THE SEPARATE USE OF MARRIED WOMEN, WITH A POWER TO APPOINT "FROM TIME TO TIME."

WE have seen that judges of great eminence have differed materially on the effect to be produced by settlements to the separate use of married women, which give a power of appointment, and prescribe the form of the instrument in which such power is to be exercised ; Sir Pepper Arden maintaining, in opposition to the decision in *Newman v. Cartony*,<sup>a</sup> that a disposition in a form different from that directed would be void,<sup>b</sup> while, in a case where there was a power to a *feme covert* to dispose of her separate estate by will, Sir William Grant upheld a charge upon it, created by a different form of instrument.<sup>c</sup>

However, there is another class of cases upon the same subject, which has occasioned much discussion, and the authority of which has been much and frequently questioned. These are they where the trusts are for the separate use of married women, with a power to them to dispose, without any restriction as to the form of the instrument by which that disposition is to be made, but with an apparent qualification annexed to it as to the *time* at which their power may be exercised, namely, "from time to time." These words, whenever they have occurred in settlements to the separate use of married women, have excited a doubt, whether they do not confine the power of disposition to rents and profits, (if the trust be of lands,) and to dividends or interest, (if the trust be of

<sup>a</sup> Cited in *Pybus v. Smith*, 3 Br. C. C. 340.

<sup>b</sup> *Socket v. Wray*, 4 Br. C. C. 483.

<sup>c</sup> *Heatley v. Thomas*, 15 Ves. 596.



money,) as they accrue, and whether they do not prevent a sweeping appointment during the lives of the *cestui que* trusts, though there should be a power to them to dispose of the entire of the trust estate, by acts to operate after their deaths. The decisions, however, have been, though with much reluctance, that the words, "from time to time," coupled with a power to appoint, are no restriction on that power.

*Ellis v. Atkinson*<sup>d</sup> is one of the leading cases decided on this subject. In that case, the trust was to pay the interest of 2000*l.* into the plaintiff Susannah's own hands, or to such person or persons as she, notwithstanding her coverture, should, by writing under her hand, "from time to time" appoint, to the intent that the same should be for her sole, separate, and peculiar use, and might not be subject to the debts, &c. of the husband; and in case the said Susannah should survive her husband, then the said sum should be in trust for her, but if she should die in the lifetime of her said husband, then that same should be on such trusts as she should direct and appoint, notwithstanding her coverture. The husband and wife having afterwards agreed that she should give up to him all her interest in the 2000*l.*, she, by deed poll, directed and appointed, that her husband and his assigns should, thenceforth, during the joint lives of plaintiffs, receive the interest of said 2000*l.*; but the trustees refusing, they filed a bill, praying that the trustees might assign this property to the husband. The Lord Chancellor (Thurlow) doubted much, whether he could take her consent to part with this property, and he ordered that the case should be argued again, which was accordingly done very much at length; and his Lordship ultimately decreed, that the trustees should assign to the plaintiff, Thomas Ellis, or to whom he should appoint. In *Ellis v. Atkinson*, another case of the same nature was cited, viz. *Clarke v. Pistor*, where the trust was to pay the interest and dividends of stock to such persons as the plaintiff

Trust to pay for separate use of feme covert, as she should direct "from time to time," does not prevent a sweeping appointment.

Margaret should, "from time to time," during her life, notwithstanding her coverture, by any note or writing under her hand, direct or appoint; and, in default of such appointment, then into the proper hands of said Margaret, for her sole use, and, after her death, to transfer the stock to her husband absolutely. On a bill filed by husband and wife, without making any appointment, and on the consent of the wife, the Court directed the trustee to transfer.

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*Pybus v. Smith*<sup>e</sup> is the next case upon the same subject, and has been rendered remarkable by this circumstance, that the words "from time to time," were introduced into a married woman's settlement by the Master in Chancery, for the very purpose of guarding her against a sweeping disposition of her separate property. In this case, Mrs. Vernon, while she was a ward of the Court, had been carried off to Scotland by Mr. Vernon, where they were married. On their return, he agreed with her friends that part of her fortune should be settled on her and her children, the remainder being given to himself. He, accordingly, made proposals, that her real and personal estate should be vested in trustees, in trust "to pay the rents and profits into her own hands," which was rejected. The settlement was then drawn in this way, and approved of by the Master: "That the real estate of Mrs. Vernon should be vested in trustees in trust, to permit her to receive the rents and profits during her life, or to pay them to such persons, in such proportions, and for such uses, as she should, by any deed or writing, under her hand, with or without power of revocation, 'from time to time appoint,' and in default of such appointment to her sole use for life, and, after her decease, if she should have no children, to such persons, in such estates and proportions, &c. &c. as she should, whether sole or covert, by any deed, &c. &c. appoint." Her personal fortune was settled in the same way, except that the words "from time to time" were omitted. (There were no children of the marriage.) After this settlement was executed, Vernon being indebted in a large

sum to the plaintiffs, Mrs. Vernon, by indenture of the 15th of August, 1785, reciting the settlement, joined her husband in giving a security to them upon her separate property, both real and personal. On the 16th of the same month, (the next day,) by deed poll, she appointed the rents and profits of her real estate to be paid to her husband by the trustees, and also appointed her reversion to him in fee. Afterwards another security was executed by the husband alone to the plaintiffs, by which her estates were again made liable. Vernon became a bankrupt, and the bill was filed against him and his wife and her trustees, praying to have the benefit of these securities. For the defendants it was said, that it was impossible that the Court, when it vested this property in trustees to pay into the hands of a married woman, could have intended that she should have the power of disposing of it altogether at one time, and thus put an end to her means of future existence. The intention, they said, was, that the rents and interest should be a provision for her from quarter to quarter, as they were paid, and that she should have a power of appointing only "from time to time" as they became due. Lord Thurlow said, that the doubt he had entertained was, whether the words "from time to time" would not render it impossible for her to make a sweeping appointment of the whole. His Lordship then referred it to the Master, to inquire and report under what circumstances the deeds were executed; and when the cause afterwards came on upon the report, and it appeared that Mrs. Vernon knew what she was about, he said that her alienation of the property must be allowed, for that a *feme covert* had been considered by the Court as a *feme sole* with respect to her separate property.

Such was the advantage Mrs. Vernon derived from the care and anxiety of the Court to defend her interests by the guarded terms of a marriage settlement. "The Court," as Lord Eldon observed in *Jones v. Harris*,<sup>f</sup> "settling the property, in order to protect it, with all the anxious terms

<sup>f</sup> 9 Ves. 493.

then known to conveyancers, in a day or two afterwards, while the wax was yet warm upon the deed, the creditors of the husband got a claim upon it by an informal instrument ; and the same Judge who had made such efforts to protect her, was, upon authority, obliged to withdraw that protection." Indeed, Lord Thurlow showed great reluctance in deciding as he did ; for he is reported to have said, that, if the point were open, he should have thought that a *feme covert* should not be allowed to part with her separate estate without examination ; but that the rule was settled, that, in that respect, she was sole.

Trust to apply rents, &c. as a feme covert should "from time to time" direct, does not prevent a sweeping appointment.

*Witts v. Dawkins*<sup>g</sup> is a decision to the same effect, and was pronounced on the authority of *Pybus v. Smith*.<sup>h</sup> There the trust was, that the trustees should pay, apply, and dispose of all the rents, issues, and profits of certain hereditaments and premises, to such person or persons only, and for such intents and purposes only, as Agnes Witts should, by any writing or writings to be signed with her hand, "from time to time" direct or appoint, notwithstanding her coverture ; and in default of such appointment, and in the mean time, and from time to time, until she should make such appointment, should pay all such rents, &c. or so much, whereof she should or might from time to time happen to make no appointment, into her proper hands, for her sole and separate use and benefit, exclusive of her then intended husband, who was not to intermeddle with the same. The marriage took place, and after it, Witts and his wife filed their bill, in which they stated, that they had entered into an agreement with the defendant Dawkins, for the sale of her separate estate during the joint lives of herself and of her husband, and prayed a specific performance of the contract. The defendant, the purchaser, not objecting, if a good title could be made out, the counsel for the plaintiffs endeavoured to distinguish the principal case and *Pybus v. Smith*, from *Whistler v. Newman*<sup>i</sup> and

<sup>g</sup> 12 Ves. 501.

<sup>i</sup> 4 Ves. 129.

<sup>h</sup> 1 Ves. jun. 189. 3 Br. C. C. 339.

*Mores v. Huish*; <sup>j</sup> but his Honour, the Master of the Rolls, said, that these cases did not interfere with *Pybus v. Smith*, they turning upon their own circumstances, and not upon the construction of the words "from time to time;" and, accordingly, he decreed for the plaintiffs. So, in *Brown v. Like*, <sup>k</sup> these words, "from time to time," were introduced into a will bequeathing stock to trustees for the separate use of a married woman, and one of the questions made in the cause was, whether she had a sweeping power of appointment? and the counsel for the defendant, without argument, admitted that she had, although the clause seemed to have been used with a strong wish, that it should produce some restraint on her power of alienation. And, in *Acton v. White*, <sup>l</sup> where a husband devised property to his wife for her separate use for life, in terms strongly expressive of his desire that she should not have it in her power to anticipate the rents and profits; yet it was held, that these expressions had no restrictive effect. The trust was, "to pay rents, interest, &c. &c. for the sole and separate use of his wife during her life, notwithstanding coverture; and that the trustees should, 'from time to time,' pay the dividends, &c. into the hands of his said wife, and *not otherwise*. And that the receipt of his said wife alone for what should be actually paid into her own proper hands as aforesaid, should, from time to time, notwithstanding coverture, be a sufficient discharge;" and the Court enforced a specific performance of an agreement to sell the wife's interest, she being willing to join in the conveyance to the purchaser.

In these cases which have been just stated, it was the opinion of the learned judges who decided them, that, upon authority, the words "from time to time," in instruments conveying property to the separate use of married women, with whatever views they may have been used, possess no restrictive quality whatsoever on her powers of disposition; and that they have no other effect than to

j 5 Ves. 692.

l 1 Sim. & Stu. 429.

k 14 Ves. 302.

create, in the view of the Court of Chancery, a separate interest of the wife in the property. And the principle, as stated by Lord Eldon,<sup>m</sup> is this, that all these words are only an unfolding of all that is implied in a gift "to a separate use." In fact, according to this principle, to say that a *feme covert*, to whose separate use property has been limited, shall have a power to appoint, "from time to time," is only an expression of one of the rights which a gift of that kind confers; it is only a description of one of the modes of disposition, which the nature of her property enables her to make, but does not confine her power to that mode only: just as if a conveyance in fee had been made to a *feme sole*, or to a man, with a clause annexed, that the grantee should have a power to sell "from time to time," such clause would not amount to a restriction on the tenant in fee to alienate in whatever way he thought fit. Besides, the Court might have been influenced by this view of the subject, that as the instruments in which these words, "from time to time," occur, confer separate estate on married women; and as the rule in equity is, that they are competent to act as unmarried women with respect to their separate estate, this rule controls and defeats every qualification which is inconsistent with it. As in *Bradley v. Peixoto*,<sup>n</sup> where it was held, that a restraint on alienation, annexed to a bequest of a sum of money, must be rejected, as a condition repugnant to the estate given. And, in like manner, where there was a devise of rents and profits for life, to be paid into the hands of the devisee, with a condition, that if he alienated, the devise should be void. The devisee afterwards became bankrupt, and Lord Eldon held, that the condition was void, and the assignees entitled to the rents.<sup>o</sup> However, Lord Thurlow made an effort to restrict this power of alienation, and to bring the wife into a situation more consistent with the intention of the settlor; for, in addition to the words

<sup>m</sup> *Parkes v. White*, 11 Ves. 222.  
<sup>n</sup> 3 Ves. 324. See, also, *Dommet*  
*v. Redford*, 3 Ves. 149.

<sup>o</sup> *Rose's Bankrupt Cas.* 200.

“from time to time,” he introduced the words, “and not by anticipation,” into Miss Watson’s settlement, with a view to restrain her from a sweeping disposition.<sup>p</sup> And his Lordship justified himself by saying, that he did not, by this restriction, take away any of the incidents of property at law ; for that this kind of interest, which a married woman was allowed to take, was a creature of equity, and that equity had a right to modify the power of alienation. This clause against anticipation has ever since been held to be valid. Lord Alvanley approved of it in *Socket v. Wray*,<sup>q</sup> and Lord Eldon, in *Jackson v. Hobhouse*,<sup>r</sup> said, for many years after he had entered the profession, no such thing was known as a clause of restraint upon alienation of a wife’s separate property by way of anticipation ; but that it was too late now to contend against the validity of such a clause. The settlement in this latter case contained a proviso against the wife assigning or otherwise disposing of her separate property in any mode of anticipation ; and Lord Eldon ruled it to be valid. And in *Ritchie v. Broadbent*,<sup>s</sup> where the trust of a marriage settlement was declared to be, during the coverture, to pay the dividends as the wife, notwithstanding her coverture, from time to time, by any writing signed with her own hand, should direct or appoint ; but not so as to deprive herself of the intended use or benefit thereof, by sale, mortgage, charge, or otherwise, in the way of anticipation ; and, for want of appointment, into her hands, for her separate use, independently and exclusive of her husband, her receipts to be sufficient discharges ; on a bill by husband and wife against the trustees, praying that it might be declared, that the husband was entitled to the money so settled, freed from the trusts of the settlement, the Lord Chief Baron, sitting for the Chancellor, dismissed the bill, saying, that to make the decree required, would be anticipating the fund.

Clause against anticipation of separate estate by married woman, valid.

Clause against anticipation of separate estate by sale, mortgage, &c. &c. prevents sweeping appointment.

<sup>p</sup> See note (a) to *Chassaing v. Parsonage*, 5 Ves. 17.  
<sup>q</sup> 4 Br. C. C. 483.

<sup>r</sup> 2 Mer. 483.  
<sup>s</sup> 2 Jac. & Walk. 456.

But Mr. Sugden, in his treatise on Powers,<sup>t</sup> says, that, on the first introduction of the words "by anticipation, it was the general opinion of the profession, that they were simply void, and that the woman's power of alienation still existed." He adds, that there is, perhaps, no sound principle upon which a restraint, upon alienation, can in any case be supported, where the interest is not given over, or made to cease upon alienation; and that, at all events, it might be thought, giving full effect to Lord Thurlow's doctrine, the power of alienation could not be suspended beyond the coverture of the object of the provision. So that, according to this opinion, the cases denying a restrictive effect to the words, "from time to time," seem to be founded in good sense and on solid principle.

It is now the practice of conveyancers, where it is intended to restrain a married woman from a sweeping disposition of her separate interest, to insert a clause that she shall not sell, mortgage, charge, or otherwise dispose of the same by way of anticipation;<sup>u</sup> and as the eminent author above referred to observes, where these words are omitted, it were perhaps better to hold that the wife may aliene the property.<sup>v</sup>

<sup>t</sup> Sugden on Powers, 110. 2d edit.

<sup>u</sup> Ibid. 112.

<sup>v</sup> Ibid. 114.



## CHAP. IX.

## OF THE LIABILITY OF A MARRIED WOMAN'S SEPARATE ESTATE TO HER GENERAL ENGAGEMENT.

IN the preceding chapters an attempt has been made to explain and elucidate the rule, "that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were a *feme sole*;" and all the cases seem to concur in affixing this meaning to it, that whenever a married woman acquires property to her separate use, exclusive of her husband, she may deal with it as she pleases, and exercise over it every right which she could possess if she were unmarried. However, it is not to be understood that she is so far a *feme sole* that a personal decree can be had against her, as any judgment or order of a court of equity upon this subject will affect her separate estate only.<sup>a</sup> *Socket v. Wray*<sup>b</sup> appears indeed to have narrowed the above interpretation of the rule, by deciding that a *feme covert* cannot dispose of property given to her separate use by an instrument different from that prescribed to her; but it must be remembered, that his Honour, Sir Pepper Arden, in that case, denied that Mrs. Socket had separate property, and of course the rule could not apply to her.<sup>c</sup> However, Lord Thurlow went as far in an opposite direction to extend the rule, and to give it an interpretation which has not hitherto been acquiesced in with perfect satisfaction by the Bench; for in *Hulme v. Tenant*,<sup>d</sup> his Lordship held, that the general personal engagement of a *feme covert* by bond was a lien on her personal pro-

A personal decree cannot be had against a *feme covert* with respect to her separate estate.

Effect of engagement of *feme covert* by bond on her separate estate.

<sup>a</sup> 1 Br. C. C. 16. 1 Mad. 262. Grant in Heatly v. Thomas, 15 Ves. 596.

<sup>b</sup> 4 Br. C. C. 483.

<sup>c</sup> See the judgment of Sir W. d 1 Br. C. C. 16.

perty, and on the rents and profits of her real estate, settled to her separate use, and might be executed out of them. The trust in *Hulme v. Tenant* was to "receive and pay the rents and profits of leasehold and freehold lands to the wife for her separate use, and to convey the estate itself to such use as she, by her last will in writing, or by deed or writing under her hand and seal, executed in the presence of two witnesses, should appoint, and in default of appointment, to the use and behoof of her heirs and assigns." There was a further trust to sell part, and the produce to be laid out according to the appointment of the wife, but the question was confined to the lands mentioned in the former part of the trust. In 1769 the husband of Mrs. Tenant borrowed 50*l.* from the plaintiff, Mrs. Hulme, for which he gave as a security a bond executed by himself and his wife. The following year, Mr. Tenant having occasion for a further sum, Mrs. Tenant applied to Mrs. Hulme for 130*l.*, which was given to her on a new bond, executed by herself and her husband, for the two sums, amounting to 180*l.*, and she at the same time paid the interest due on the former loan of 50*l.* The bill was filed by Mrs. Hulme against husband and wife, and her surviving trustee, to recover these sums so secured out of the wife's separate estate. The cause had been heard before Lord Bathurst, who dismissed the bill. It came on now to be re-heard, and it was contended for the defendants, that although a *feme covert* might contract with respect to her separate estate, yet the security given must be agreeable to the nature of the property; it must be a security which would be a lien upon it, such as a mortgage would be: that the act done by a married woman, in order to bind her separate estate, ought by some means to refer to it; but that the bond in the present case had no reference whatsoever to any property.

The counsel for the plaintiffs relied upon the rule that a *feme covert* was competent to act in all respects as a *feme sole* with respect to her separate property. Lord Thurlow said, that he had no doubt about this principle, that if a

court of equity says, that a *feme covert* may have a separate estate, the Court will bind her to the whole extent as to making that estate liable to her own engagements, as, for instance, for the payment of debts, &c. &c.; but that he did not find that the Court had ordered a power to be executed; they had only stopped the fund where the power was executed; that he, therefore, could not order the *feme covert* to execute her power, but he was exceedingly clear, that the leasehold would be liable. His Lordship then referred it to the Master to take an account of the rents and profits of the leasehold estates; but before the report was made the parties compromised, the defendant paying the principal sum borrowed, with interest, without any costs.

This decision has never since been received with perfect acquiescence by the profession. Lord Eldon has frequently questioned its soundness, calling it, on one occasion, a prodigiously strong case;<sup>e</sup> and, on another, doubting the principle on which it was decided.<sup>f</sup> It is hoped, therefore, that it will not be deemed too presumptuous, to enter into a consideration of the judgment, and to endeavour to show that the reasoning of the Court does not warrant the conclusion that has been drawn. His Lordship, after stating the facts of the case, lays down the rule to be, "that a *feme covert*, acting with respect to her separate property, is competent to act in all respects as if she were sole; and he cites *Allen v. Papworth*,<sup>g</sup> and *Grigby v. Cox*,<sup>h</sup> as instances to prove the extent and meaning of that rule; but neither of these cases proves that a *feme covert*, having separate property, acts with respect to it when she executes a bond without any reference to that property; or, in other words, that her general personal engagement is a lien upon it. The first case, *Allen v. Papworth*,<sup>i</sup> was where husband and wife filed their bill for an account, the wife with her husband submitting that the profits of her separate estate, which she had power to appoint as she pleased, should be

<sup>e</sup> *Nantes v. Corrock*, 9 Ves. 188.

<sup>f</sup> *Jones v. Harris*, 9 Ves. 497.

<sup>g</sup> 1 Ves. sen. 163.

<sup>h</sup> 1 Ves. sen. 517.

<sup>i</sup> 1 Ves. sen. 163.

applied to pay her husband's debts; and it was held, that she was bound by that submission; and the profits of her separate estate were, by the decree, directed to be so applied. Now, here, the wife's engagement, if the bill in which she was a party with her husband may be called one, was neither general nor personal; its express object was to create a special lien on her separate estate, which she prayed might receive the sanction of a court of equity by its decree, and, therefore, was unlike a bond, or any other general engagement, which, if she were sole, would have bound only her person. The other case, *Grigby v. Cox*,<sup>1</sup> was, where the wife had contracted to sell her separate estate, being authorized by settlement to dispose of it, her husband covenanting that it should be free from incumbrances; and a bill being filed by the purchaser against husband and wife, and the trustees, for a specific performance, the Court bound her as a person equally competent as if sole to a specific execution of that contract. In this case, as well as in *Allen v. Papworth*, the separate property was the avowed object of the agreement; so that these cases only prove, that where a *feme covert*, having separate property, specifically pledges it, and expressly acts with respect to it, the property is bound by her agreement.

But, as his Lordship observed, it is going a great deal farther than either of these decisions, to say, that a *feme covert*, having separate estate, binds the entire of her personal property, and the rents and profits of her real estate, when she contracts a debt, and signs a bond, without any express reference, or without even an allusion to these interests. If Mrs. Tenant had executed this bond while she was sole, it would have bound her person only; how, then, can her execution of the same kind of instrument, during her coverture, have a different consequence, and extend its power of binding to her personal property, and to the rents and profits of her real estate, when, with respect to that estate, she is competent to act only as if she were sole? How can a bond, which professes to bind the person of a

<sup>1</sup> Ves. sen. 517.

*feme covert*, and which is, therefore, void, both at law and in equity; how can it be construed to bind her separate property, where the same form of instrument, executed by her, if she were unmarried, would affect her person only?

The principal ground on which this bond of Mrs. Tenant could have been held to be a charge on her separate estate, was, that it afforded evidence of an agreement on her part to that extent;<sup>k</sup> for a court of equity has never gone the length of charging the separate estate of a married woman, except on the ground of contract.<sup>l</sup> And the reason for inferring an agreement of that nature on the part of Mrs. Tenant, from her execution of a bond, is this, that, being a married woman, and, therefore, incapable of binding herself personally, and having separate property, and being (though married) capable of binding that, she must be supposed to have intended to act merely with reference to that property. But does it follow, because a security is taken from a married woman, it is, therefore, taken from her as having separate property, and that she, by giving the security, means to pledge that separate property? Lord Eldon expresses a doubt<sup>m</sup> whether there is any authority, that merely because a man contracts with a married woman, the Court would consider him, in all events, as contracting with her, not as a married woman merely, but as a married woman having separate estate. The intention is to be collected from the act done, and it seems strange to infer, that because the one gave, and the other accepted of a security, which could not produce the effect which it purported; therefore, the intention was, to produce another and a different effect, which it had not expressed. The argument is this: Mrs. Tenant is a married woman; she has separate estate, and she has executed a bond; she, therefore, intended to charge that estate; that is, in other words, she expressly contracted to bind her person, which she could not do, and, therefore, it must be inferred, that she intended to bind her

<sup>k</sup> *Sperling v. Rochfort*, 8 Ves. 175. *Mansfield in Nurse v. Craig*, 2 New Rep. 163.

<sup>l</sup> See the judgment of Sir James *m Jones v. Harris*, 9 Ves. 497.

estate, which she has never once referred to in that security. Besides, supposing that the intention of contracting with a married woman, as having separate estate, must necessarily be inferred from the circumstance of entering into any contract with her for the payment of money, still is there a jurisdiction in a court of equity to execute an agreement differing essentially from that into which the parties have entered. The agreement in *Hulme v. Tenant*<sup>a</sup> was, that Mrs. Tenant would bind herself personally for the discharge of a debt; and the Court was called on to give the plaintiff the benefit of a contract into which he had not entered, namely, that her estate should be bound, a jurisdiction which Lord Eldon distinctly disclaims.<sup>o</sup>

Separate estate of feme covert held liable to her bond debt after her decease, she having devised her estate for the payment of her debts.

However, the decision in *Hulme v. Tenant*, "that the bond of a *feme covert* shall bind her personal estate, and the rents and profits of her real estate," when settled to her separate use, appears to have had some precedent to warrant it in the cases of *Norton v. Turvill*,<sup>p</sup> and *Stanford v. Marshall*,<sup>q</sup> though the latter of them was not cited upon the discussion of that question. In the first case, a *feme covert* had, before her marriage, with the consent of her intended husband, conveyed an estate to her separate use, and after her marriage she borrowed 25*l.* upon her bond. Ten years afterwards she made her will, giving several specific legacies, and made A. and B. executors. On her death, her husband possessed himself of money that she left, to the amount of 24*l.*, after which the obligee in the bond filed his bill against the husband and the executors. His Honour, the Master of the Rolls, held, that the separate estate was liable to the bond debt. But it is to be observed of this case, that the Master of the Rolls gave this judgment expressly on the ground, that the separate estate of the *feme covert* was a trust estate for the payment of debts, which would give a claim to the bond creditor against the assets of the testatrix, and against her executors, and the persons intermeddling with these assets. And this

<sup>a</sup> 1 Br. C. C. 16.  
<sup>o</sup> 9 Ves. 494.

<sup>p</sup> 2 P. Wms. 144.  
<sup>q</sup> 2 Atk. 68.

circumstance marks a very important difference between the cases of *Hulme v. Tenant* and *Norton v. Turvill*, which is, that in the latter the bill was filed against the husband and the representatives of the wife, and not against the wife herself as in the former ; for although the Court held these persons to be liable to pay the amount of her bond debt out of her assets, which had come to their hands, still it does not follow, that, if she were living, her separate estate would have been bound by her execution of a bond. But *Stanford v. Marshall*<sup>r</sup> comes nearer to the subject under discussion. There a father, by deed, creates a trust of a real estate for the benefit of his daughters, the rents and profits to be paid to them, whether sole or covert, for their separate use, either to their own or to the hands of any persons they should appoint. They join their husbands in bonds for money lent. The trustee refuses to pay, and the creditor files a bill to compel him to pay the rents and profits in liquidation of his demand. The Master of the Rolls ordered the trustee to pay the rents and profits to the creditor, saying, that the daughters had an absolute power over the rents and profits, and that they might create any lien they pleased upon them. Now, it is not to be denied that the daughters might have created any lien they pleased upon the rents and profits ; but the question is, whether the execution of a bond, without any reference to their separate estate, will amount to such lien ? Besides, it does not appear in the case that the daughters resisted the payment of the bond ; the trustee seems to have been the only person refusing, so that if the daughters were defendants, (as they ought to have been,) they might have assented to the prayer of the bill by their answer, (for any thing that is stated to the contrary,) which would have been considered as a valid appointment. *Hulme v. Tenant* derives some further assistance from a dictum of Lord Hardwicke in the case of *Peacock v. Monk*,<sup>s</sup> where his Lordship says, that if a *feme covert*, having an estate to her separate use,

<sup>r</sup> 2 Atk. 68.<sup>s</sup> 2 Ves. sen. 193.

borrow money, which she gives a bond to pay under her hand, this would give a foundation to demand the money against her out of her separate estate. But this is only a dictum of his Lordship, wholly unconnected with the principal question before him.

There are, however, four cases subsequent to *Hulme v. Tenant*,<sup>t</sup> which seem to have been decided on principles directly adverse to it. They are, the *Duke of Bolton v. Williams*,<sup>u</sup> *Jones v. Harris*,<sup>v</sup> *Angel v. Hadden*,<sup>w</sup> and *Aguilar v. Aguilar*.<sup>x</sup> In the first case, Mrs. Williams, the defendant, had an annuity of 300*l.* to her separate use charged on the Duke of Bolton's estate, (her husband being abroad,) out of which she granted other annuities to different persons. She afterwards filed a bill, by which she sought to set aside these annuities, on the ground that she was a *feme covert*, and, as such, incompetent to make these assignments of her annuity; and her bill was dismissed. Objections having been afterwards discovered to the memorials of the assignments, which rendered the grants of the annuities void, Mrs. Williams claimed the arrears of her annuity, and gave notice to the Duke of Bolton not to pay the executors of the persons to whom she had assigned. The executors made the same claim, and gave notice to the Duke not to pay her; on which the Duke filed a bill of interpleader. Mrs. Williams, by her answer, offered to pay the consideration money given to her for the assignments, deducting from it what had been received of the annuity. This case was argued before Lord Thurlow, in July, 1791, who decreed the annuities to be void, and that the arrears should be paid by the Duke to Mrs. Williams. It was now (June, 1793) re-heard before Lord Loughborough; and it was argued, on the part of the executors of the assignees of the annuity, that the consideration-money ought to be refunded out of the separate estate of Mrs.

t 1 Br. C. C. 16.

u 2 Ves. jun. 138.

v 9 Ves. 486. See also *Nantes v. Corrock*, 9 Ves. 182.

w 2 Mer. 164.

x 5 Mad. 414.



Williams. But his Lordship said, that the executors were but general creditors of Mrs. Williams; that they had no lien; and he affirmed the decree. A similar decree was pronounced in *Jones v. Harris*,<sup>y</sup> where a *feme covert*, having power to charge her separate estate, granted an annuity out of it to raise money for the purpose of paying debts affecting it. The grant of the annuity was void in consequence of the informality of the memorial, and a bill was filed by the annuitant, praying that the annuity should be paid, or, if void, that the consideration should be paid back out of the separate estate. The bill was dismissed on the authority of the *Duke of Bolton v. Williams*. *Angel v. Hadden*,<sup>z</sup> and *Aiguilar v. Aiguilar*,<sup>a</sup> establish the same principle, that, under such circumstances, there can be no lien for the price of the annuity on the wife's separate estate. In the last case, Sir John Leach assigned these reasons for his judgment: "That a *feme covert* could not, by the equitable possession of separate property, acquire a power of contract; she had a power of disposition as incident to property, and her actual disposition or appointment of the property would bind her. That this Court would apply her separate property in payment of an annuity, which she had charged upon it; but it could not apply her separate property in repayment of the consideration of that annuity, which she had not charged upon it. That being incapable of contract or general engagement, this Court could not fasten upon her separate property those equities which arise out of contract and general engagement."

Now, it does seem, that these four cases, at least indirectly, overrule the case of *Hulme v. Tenant*.<sup>b</sup> The claims of the creditors, in the *Duke of Bolton v. Williams*, in *Jones v. Harris*, *Angel v. Hadden*, and *Aiguilar v. Aiguilar*, arose from the implied assumpsit of the *femes covert* to repay the consideration paid for annuities, the object for which they were given, namely, the annuities, having failed. If the *femes covert* in these cases, had entered into express con-

y 9 Ves. 486.  
z 2 Mer. 164.

a 5 Mad. 414.  
b 1 Br. C. C. 16.

tracts by bond to repay the consideration of the annuities, provided they could not be enforced, would these bonds place the obligees in a better situation than the mere implied assumpsits? The bonds, not being appointments, and not referring to the separate property of the *femes covert*, would be as far from operating as liens on it, as the implied undertakings. The difference between these two engagements is this, that one is express, and the other is implied; but surely there is as much reason to infer, that a married woman intends to repay out of her separate estate money which she has received, the consideration for which has failed, as that she means to pay a debt out of her separate estate, for which she has executed a bond, and the more particularly when the implied contract grew out of a transaction in which the married woman had expressly charged that estate. If actions had been brought upon these implied contracts, it is clear that they must have failed, as the contract with a married woman would be void at law. Then, would a court of equity make good against a married woman, a contract bad at law, because incapable of maintaining an action against her. Lord Loughborough said, that he would consider much before he would advance the remedy against a married woman further than the law gives it.<sup>c</sup> In fact, if, in these cases, bonds had been given for the consideration money, the decisions must have been precisely the same, as they were on the implied assumpsits; for the reason given for refusing to render these implied promises a lien on their separate properties, viz. that they were a mere personal demand, and created no specific lien, and that they were incapable of producing an action against the married woman, would apply just as well to the case of a bond. Now, on what possible ground could a bond be held to be a charge on the separate estate of a *feme covert*, if the implied assumpsit were not. If the bond could be construed as a covenant to pay out of the produce of the separate estate, it might then be deemed a charge upon

c Duke of Bolton v. Williams, 2 Ves. jun. 196.

that fund, as in *Legard v. Hodges*;<sup>d</sup> but no such construction could be put upon it, unless it pointed out the fund from whence the money was to be paid. It is therefore submitted, that the *Duke of Bolton v. Williams*,<sup>e</sup> *Jones v. Harris*,<sup>f</sup> *Angel v. Hadden*, and *Aiguilar v. Aiguilar*, do in effect overrule the case of *Hulme v. Tenant*.<sup>g</sup> Notwithstanding these cases, and notwithstanding the constant dissatisfaction with which *Hulme v. Tenant* has been received, whenever it has been cited, yet two other cases have been decided on its authority, viz. *Heatly v. Thomas*,<sup>h</sup> and *Bulpin v. Clarke*.<sup>i</sup>

In the first of these cases, the bond of a *feme covert*, given as a surety, was enforced against her separate estate, she having a power of appointment by will, or any writing purporting to be her will, and in default of such appointment, then if she should die during the life of her husband, that it should go according to the statute of distributions. The facts were these; James Willis borrowed 700*l.* on the joint and several bond of himself, of William Johnson the husband, and Margaret Johnson his wife, with a condition reciting that Johnson and his wife had joined as securities at the request of Willis. Mrs. Johnson also gave her husband a bond of indemnity. William Johnson and his wife afterwards died, she having made her will according to her power, and having disposed of every thing she possessed by it. James Willis, whose surety she was, afterwards became bankrupt, and the plaintiff, Heatly, from whom the 700*l.* had been borrowed, proved his debt under the commission, and received four pence in the pound. The bill was filed by Heatly against the executors of William Johnson, and the executor and trustees of his wife, praying a declaration, that the estates of William Johnson and James Willis, and the separate estate of Mrs. Johnson, were liable to pay the principal and interest due by bond to the plaintiff.

The Master of the Rolls said, that he had doubts whe-

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d 3 Br. C. C. 531.

e 2 Ves. jun. 138.

f 9 Ves. 486.

g 1 Br. C. C. 16.

h 15 Ves. 596.

i 17 Ves. 365.

ther the bond would affect the separate property of the wife under the authority of *Socket v. Wray*.<sup>j</sup> To this it was answered for the plaintiff, that *Socket v. Wray* did not apply to the present case, the question there being, whether during the life of a married woman, the Court could apply her separate property according to her engagement, which could not be done, unless the bond could be considered as an appointment? On the other side, it was argued that *Hulme v. Tenant* had gone far in determining that a *feme covert*, having an absolute power of disposition over her separate property, should be considered as a *feme sole* for the purpose of charging it with her debts; but that it was going too far to say, that the separate estate of a *feme covert*, which she had a power of disposing of by will, should be liable to her bond debts after her death. That if it had been sought to charge her estate during her life in this way, *Socket v. Wray* would have been decisive against such an attempt; and that it was strange to say that a bond, which would have been ineffectual during her life, should have derived all its efficacy from her death. The Master of the Rolls said, the question was, whether this was separate property to all intents and purposes? That in *Socket v. Wray* Lord Alvanley did not consider a married woman, who could appoint only by will, as having separate property. That if Mrs. Johnson had an absolute property in this money, then the case came within *Hulme v. Tenant*, in which Lord Eldon had expressed some doubt, on one occasion calling it a prodigiously strong case;<sup>k</sup> and upon another occasion,<sup>l</sup> saying that whenever the point should distinctly occur, those cases would require full consideration. His Honour then said that he should look with some attention at this settlement; that much would depend upon its particular expressions. However, by the decree, it was declared, that the separate estate of Mrs. Johnson was liable to pay so much of what should be reported due

<sup>j</sup> 4 Br. C. C. 483.

<sup>k</sup> *Nantes v. Corrock*, 9 Ves. 182.

<sup>l</sup> *Jones v. Harris*, 9 Ves. 497.

See, also, *Sperling v. Rochfort*, 8 Ves. 175.

to the plaintiff, as should not be recovered from the estate of James Willis, (the bankrupt and principal in the bond,) the said Sarah Johnson having given a bond of indemnity to her husband.

So that from this decree it would appear that the Master of the Rolls had not only acted on the case of *Hulme v. Tenant*, notwithstanding the doubts of Lord Eldon respecting it, but had also overruled the case of *Socket v. Wray*.<sup>m</sup> It may, however, be material to observe, that there is this distinction between *Heatly v. Thomas* and *Hulme v. Tenant*, viz. that in the latter the question was, whether the amount of a bond executed by a married woman could be levied out of her separate estate during her life; while, in the former case, as well as in *Norton v. Turvill*,<sup>n</sup> it was decided, that such property could be made liable to her contract after death, in the shape of assets, to which the creditor might be allowed to resort. And there is also this difference between *Socket v. Wray* and *Heatly v. Thomas*, that in the former, in default of appointment by will, the limitation was to the executors and administrators of Mrs. Socket; in the latter, it was according to the statute of distributions.

*Bulpin v. Clark*<sup>o</sup> is a further support to *Hulme v. Tenant*. There, previous to the marriage of the defendants, John and Margaret Clark, estates, to which Margaret was entitled under the will and settlement of her former husband, were conveyed to trustees, and their heirs in trust, after marriage, to receive the rents and profits, and to pay the same to such person or persons, for such uses, &c. &c. as Margaret should, at any time during her life, notwithstanding her coverture, direct or appoint; and, in default of appointment, to pay the same into the hands of Margaret for her sole use. And all the personal property was assigned to the sole use of Margaret, and to be applied as she should direct. The bill was filed against Clark and his wife, and her trustees, stating that she had borrowed 250*l.* from the

Amount of promissory note of married woman executed out of her separate estate.

<sup>m</sup> 4 Br. C. C. 483.  
<sup>n</sup> 2 P. Wms. 144.

<sup>o</sup> 17 Ves. 365.

plaintiff, which she promised should be repaid out of her separate estate, and she gave him her promissory note for the amount, payable with interest. The note was admitted by the answer. And the question was, whether this note was an execution of her power? It was argued, that it could not be an execution of her power, as it had no reference to her separate property; and that a court of equity had no right to apply the rents and profits of the separate estate of a *feme covert* to the discharge of a debt. However, the decree directed the trustees to pay the amount of the note, with interest out of the rents and profits.

Where husband and wife contract for a purchase, the vendor is not entitled to discovery of her separate estate.

Grant of annuity a specific lien on separate estate, where the deed recites the powers over the estate.

However, though the separate property of a married woman be liable to her general personal engagement, when it is expressed in writing, yet it seems that, where she has contracted jointly with her husband for the purchase of an estate; the vendor seeking a specific performance of that contract, will not be entitled to a discovery, whether she has a separate property or not.<sup>p</sup> In the case referred to, there was no allegation in the bill that the wife had agreed to bind her separate property, or that she intended to bind it; there was a mere statement that she had separate moneys of larger amount than the purchase money, and an interrogatory pointed to the fact, whether she had such moneys or not. The wife demurred to so much of the bill as sought this discovery, and the demurrer was allowed. In *Power v. Bailey*,<sup>q</sup> Lord Manners held, that an annuity granted by a married woman was a specific lien on her separate estate, although she had not expressly subjected that property to the payment of it; but it was on the ground, that the deed creating the annuity recited her power over her separate estate; his Lordship considering the covenant to pay as being within the principle of *Legard v. Hodges*,<sup>r</sup> because it referred to her power over her separate estate, and was, therefore, an appropriation of it,

<sup>p</sup> *Francis v. Wigzell*, 1 Mad. Rep. 258.

<sup>q</sup> 1 Ball & Beatty, 49.  
<sup>r</sup> 3 Br. C. C. 531.

and binding upon it. In *Clerk v. Miller*,<sup>s</sup> where a married woman, having separate estate, employed workmen to work in her husband's house without his directions, and promised to pay them, the Master of the Rolls intimated, that, if the promise had been in writing, the separate property, which consisted of lands, would be subject to these creditors.

However, it seems to be now settled, that the separate estate of a married woman cannot be made liable to general demands against her; that is, where her engagement is merely implied, and not reduced into writing. In *Nantes v. Corrock*,<sup>t</sup> where it was attempted to affect the separate estate of a married woman without any lien upon it, but merely on the ground, that it was the produce of a fraud alleged to have been committed by her upon the rights of the plaintiff, Lord Eldon dismissed the bill. His Lordship's difficulty, however, arose from the nature of the property, it being stock, against which execution cannot be given in a court of equity, when there is no express lien upon it. But the Vice Chancellor, Sir John Leach, intimated a very clear opinion on this question, with respect to separate property of every description, in the case of *Greatly v. Noble and Others*,<sup>u</sup> where he said, "If it were necessary now to decide the point, I think it would be difficult to find either principle or authority for reaching the separate estate of a *feme covert*, as if she were a *feme sole*, without any charge on her part, either express or to be implied." And in a case shortly subsequent,<sup>v</sup> where the separate estate of a *feme covert* was sought to be rendered liable to her general engagements, the same Judge said, (alluding to *Greatly v. Noble and Others*,) that "he had expressed his opinion, that the separate estate of a *feme covert* was not liable to answer general demands upon her." In *Gregory v. Lockyer*,<sup>w</sup> the separate estate of a married woman was by the decree di-

Separate estate of married woman not liable to general engagement, when it is not reduced into writing.

<sup>s</sup> 2 Atk. 379.

<sup>t</sup> 9 Ves. 182.

<sup>u</sup> 3 Mad. Rep. 89.

<sup>v</sup> *Stuart v. Lady Kirkwall*, in a note to 3 Mad. Rep. 94.  
<sup>w</sup> 6 Mad. 90.

rected to be applied in payment of her debts and funeral expenses. The husband, having actually paid them, claimed before the Master to have the money repaid by her executor. The Vice Chancellor made the order, considering himself as bound by the decree, but expressed a doubt, whether, generally, the husband has a right to throw the wife's funeral expenses upon her separate estate.

So that the present state of the law on this part of our subject seems to be this, that if a married woman, having separate property, executes a bond or a note, or any other instrument, by which she pledges herself for the payment of money, that property will be bound by her engagement, though the instrument which she has signed does not purport to be a lien upon that estate. But on the other hand, that if the demand against her arise merely from an implied undertaking, there it cannot be executed out of such separate estate.

From this short review of the cases on the liability of a *feme covert's* separate property to her general engagements, it is obvious, that no clear result can be stated ; for although *Hulme v. Tenant*,<sup>x</sup> which decides, that such engagements, when express, do attach upon such property, instead of being directly overruled in any case, has, in some cases, been recognised and acted on ; yet it has, at the same time, excited so much dissatisfaction, that it is extremely difficult to say what the determination may be when the question shall next come fairly before the Court. *Pybus v. Smith*,<sup>y</sup> and *Socket v. Wray*,<sup>z</sup> have shared pretty nearly the same fate, and present the same difficulty. Both have been shaken, (though neither has been overruled,) the first by *Whistler v. Newman*,<sup>a</sup> the second by *Heath v. Thomas* ;<sup>b</sup> and, therefore, a new consideration of all these cases, so often wished for by Lord Eldon, is rendered extremely desirable.

x 1 Br. C. C. 16.

y 1 Ves. jun. 189.

z 4 Br. C. C. 483.

a 4 Ves. 129.

b 15 Ves. 596.



## CHAP. X.

OF THE PERSONS WITH WHOM MARRIED WOMEN MAY  
DEAL WITH RESPECT TO THEIR SEPARATE ESTATE, AND  
OF THE ACCOUNT OF IT TO WHICH THEY ARE ENTI-  
TLED, AND AGAINST WHOM.

THE rule that "a *feme covert*, acting with respect to her separate property, is in all respects competent to act as if she were sole,"<sup>a</sup> has been applied to all her dealings on the subject of that property. She may give, or pledge, or sell it, or make any other bargain with respect to it, with any person, in the same manner as if she were an unmarried woman. However, the rule is not extended with all its force to transactions of such a nature between husband and wife. These certainly are not the objects of positive prohibition; but then a court of equity always looks at them with a more jealous and watchful eye than it would feel itself called on to do in ordinary cases, where each of the parties was *sui juris*; for although separate property renders a married woman a *feme sole* in a court of equity, still it does not free her from the natural influence of her husband; and therefore the Court always views her dealings with him, even concerning her separate estate, with suspicion and scrutiny. Lord Hardwicke, speaking of this same rule, says, "And this will hold, though the act done by the wife is a transaction alone with the husband, although, in that case, a court of equity will have more jealousy over it; and therefore, if there is any proof that the husband had any improper influence over the wife, by ill, or even extraordinary good usage, to induce her to it, the Court might set it aside, but not without that."<sup>b</sup> With such guards upon her, it has

Rule that a *feme covert* is sole as to her separate property, not applied in its full extent to dealings between husband and wife.

Equity watches with jealousy the dealings of husband and wife, respecting her separate property.

<sup>a</sup> Peacock v. Monk, 2 Ves. sen. 190.    <sup>b</sup> Grigby v. Cox, 1 Ves. sen. 518.

Wife may give her separate estate to her husband.

been held, that a married woman is capable of making a gift of her separate property to her husband. The first reported instance of it was in *Pawlet v. Delaval*,<sup>c</sup> where Lord Hardwicke established a gift from Lady Pawlet to her husband of a large sum of money, which had been settled on her for her separate use. She had confirmed the gift after the death of her husband, by treating this money as a part of his assets ; and after her second marriage, she and her second husband filed a bill, impeaching the transaction, and seeking to invalidate the gift. Her counsel contended that the gift was void, having been from a wife to her husband. They said it was the duty of the Court to protect a *feme covert* from any inadvertent act of hers, and not to presume that she intended to part with that property ; that this Court follows with great jealousy the suspicion which the common law has of the power of a husband over his wife, and is careful to prevent her affection and obsequiousness, or her fears, from operating to her prejudice ; that a wife would not be permitted to dispose of her separate property to her husband, who by the trust is excluded from meddling with it, unless it was by her judicial consent in this Court, or by the intervention of friends or trustees. But his Lordship said, that there was no determination of that by this Court ; that the wife must come into court and consent to part with her equity, where there has been no sufficient settlement upon her ; but that no certain rule was laid down, that husband and wife, living together on proper terms, as they ought, and the wife giving up any part of her separate estate to the husband without compulsion, fraud, or ill act by the husband, this Court has said, it shall not take place ; and accordingly the bill was dismissed. So in *Pybus v. Smith*,<sup>d</sup> Mrs. Vernon gave the entire of her property to her husband, and the gift was supported by Lord Thurlow, though she had not been examined in court, and although by the act of giving this property she had stripped herself of a provision which

<sup>c</sup> 2 Ves. sen. 663.

<sup>d</sup> 3 Br. C. C. 340. 1 Ves. jun. 189.

the Court itself had most anxiously provided for her. But Lord Loughborough was disposed to exercise more strictness in transactions of this nature; for he thought that a married woman ought not to be permitted to part with her separate property to her husband without her personal examination in court. His Lordship, speaking of the rule that a *feme covert* is a *feme sole* to all intents as to her separate property, said, "It is carried a great deal further than I apprehend it was meant. As to all her debts and engagements, with respect to that, she shall be answerable as a *feme sole* would be; to the extent of that she may bind herself, and contract debts. She may transact and make bargains with regard to it; but that all the maxims of the common law, and the prudence and care of this Court, as to married women, with respect to their husbands, so liable to influence, should be totally set aside without any form—not only the guards the law has established, and the course of this Court, with respect to trust estates in equity, but without the common precaution that would attend the transactions of persons under a degree of influence—that she should be considered as a *feme sole quoad* her husband, and, in transactions between them, would require great consideration."<sup>o</sup>

His Lordship added, that he had been informed, that where the trustees have put the parties to come into this Court, the Court had not established a deed between husband and wife, upon the separate estate of the wife, without the actual presence of the wife in court. However, Sir William Grant has since determined, that "Where property is settled to the separate use of a married woman, examination is not necessary; that the property never passes by force of the examination; that the wife cannot pass any property by force of the examination; and that the examination is of use only as parting with the equity.<sup>f</sup> In *Milnes v. Busk*,<sup>g</sup> where the question was, whether a deed, executed by a married woman, whereby she directed the rents and

Examination of wife not necessary to give validity to a gift by her of her separate property to her husband.

Under circum-

<sup>e</sup> *Milnes v. Busk*, 2 Ves. jun. 488.

<sup>f</sup> *Sturges v. Corp*, 13 Ves. 192.

Sed vide *Gullan v. Trimbe*, 2 Jac. & Wal. 457.

<sup>g</sup> 2 Ves. jun. 488.

stances, gift by wife to husband of her separate property, will be set aside.

profits of her separate estate to be paid to her husband during her life, for his own use and benefit, contained an express gift of the whole of her interest during her life? Lord Loughborough held, that the intention was to give him only the administration of her property during her life, without being accountable for what he should receive; but his Lordship added, that if the intention of the deed had been to give him her entire life interest, he should have felt himself bound, under the circumstances, to set it aside. In *Rich v. Cockel*,<sup>h</sup> no doubt was expressed of the validity of a gift from the wife to her husband; the only question in the case on that subject was, whether the evidence was sufficient to prove that she had given her separate property to him? And, in *Parkes v. White*,<sup>i</sup> Lord Eldon said, that "the Court had no difficulty in supposing that a woman, having an interest to her separate use, might give it to her husband as well as to any body else; that the cases never intended to forbid that; and that if he conducts himself well, his Lordship did not know that she could make a more worthy disposition of it, though certainly the particular act ought to be looked at with jealousy." So that there can be no doubt, at the present day, that a married woman may give her separate estate to her husband, and that the gift will be established, if no unfair advantage be taken of her in the transaction. However, when it is said that a wife may give her separate estate to her husband, it must be understood of a case in which she is not restrained by a clause against anticipation; for, where husband and wife filed a bill, praying, that the trustees of property settled to her separate use, with a clause restraining her from depriving herself of it by any act in the way of anticipation, might pay it over to her by her consent, on examination in court, the Chief Baron dismissed the bill.<sup>j</sup>

Wife may sell her separate estate to her husband.

It would seem, also, that there is no objection to the wife's selling her separate estate to her husband, although, where there had been an agreement to that effect, and part of the

<sup>h</sup> 9 Ves. 369.  
<sup>i</sup> 11 Ves. 222.

<sup>j</sup> *Ritchie v. Broadbent*, 2 Jac. & Wal. 456.

purchase money had been paid by him, the Court refused to carry it into effect after the death of the husband, and held that his personal property was liable for the rents and profits which he had received.<sup>k</sup> As the wife may give and sell her separate estate to her husband, so, it seems, she may also with her separate estate purchase from her husband; and the purchased property will be protected even against creditors, if the transaction between the husband and wife be *bona fide*.<sup>l</sup>

Wife may purchase from her husband with her separate estate, and the purchase will be protected against creditors.

And the wife is so much considered as a separate person from her husband in this court, that he is on many occasions held to be accountable to her, as a stranger would be, if he had possessed himself of her separate estate. For where he has been in the receipt of the rents of her separate estate, or of the interest of her separate money, without her knowledge and consent, an account will be directed at her suit against his estate after his death. In the case of the *Attorney General v. Parnter*,<sup>m</sup> the wife had given a power of attorney to her husband to receive the dividends then due, and which should thereafter accrue, due out of certain stock to which she was entitled to her separate use. The husband afterwards died, and, she being insane, an information was filed at the suit of the Attorney General, charging that Mrs. Barker, the *feme covert*, was insane when she executed the power of attorney to her husband, and praying an account of the dividends so received by him under that power of attorney. And it being found that she had been insane at that time, the account was directed, consideration being had of the heavy expense the husband was at in maintaining her, in consequence of her being insane. It would seem too that if the husband should apply to the Court for the income of his wife's separate estate, or for part of it, for her maintenance, she being insane, and therefore incompetent to consent to such use of it, a reference would be directed to the

Husband liable to account to wife for her separate estate, received by him without her knowledge.

<sup>k</sup> Pitt v. Jackson, 2 Br. C. C. 51.  
<sup>2</sup> Ves. jun. 698.

<sup>l</sup> Lady Arundel v. Phipps and Taunton, 10 Ves. 139.  
<sup>m</sup> 3 Br. C. C. 441. 4 Br. C. C. 409.

Wife not entitled to an account of her separate property from her husband, if he had received it with her knowledge.

Master to inquire how she had been hitherto maintained, and at whose expense ; whether her husband is of ability to maintain her, due regard being had to her comfort, and whether any part of her separate estate should be applied for her use, to whom, and upon what securities. It seems, also, that if it should appear on that reference that the husband was of ability to maintain his wife, and had not done so in the manner he ought, his petition would be dismissed.<sup>n</sup> But where the wife gave an express authority to her husband to receive the rents and profits of her separate estate during her life for his use and benefit, it was held to give him the administration during his life, without any liability to account.<sup>o</sup> And even though he had received these rents without any express authority from his wife, but with her knowledge, and without either acquiescence or objection, it appears from the case of *Powel v. Hankey*,<sup>p</sup> that she would not be entitled to any account. In this case, the wife had permitted her husband to receive the interest due on mortgages and bonds settled to her separate use, without making any complaint either to the debtors, who paid the money, or to her trustees. And Lord Macclesfield decreed, that the wife was not entitled to recover the arrears of the dividends from the executors of her husband. His Lordship said, that "as it was against common right that the wife should have a separate property from the husband, (they being both in law but as one person,) so all reasonable intendments and presumptions were to be admitted against the wife in this case. That as she had for ten years together permitted the husband to receive the interest without making the least objection either to the husband, or to the debtors who paid the money, or to her own trustees, it should be therefore intended that she consented to the husband's receipt of this interest." But it appears from the same case, that if the husband had received the principal money due upon any

<sup>n</sup> Brodie v. Barry, 2 Ves. & B. 40.

<sup>o</sup> Milnes v. Buske, 2 Ver. jun. 488.

<sup>p</sup> 2 P. Wms. 82.

of the mortgages or bonds, the executors would be held liable to refund it, with interest from the death of the husband. And in *Christmas v. Christmas*,<sup>q</sup> the circumstance of the husband and wife living amicably together, while he was in the receipt of the produce of her separate estate, was considered as furnishing sufficient ground to infer that such receipt was with the wife's assent. In *Squire v. Dean*,<sup>r</sup> where the husband had applied the dividends of the wife's separate estate to the general purposes of the family, the Lord Chancellor refused to give her representatives an account of the dividends against the representatives of the husband; and in *Dalbiac v. Dalbiac*,<sup>s</sup> Sir William Grant refused an account to the wife against her husband's representatives, because she had lived with him, and had the benefit of her income while he was in the receipt of it. And in the case of *Lord Townsend v. Windham*,<sup>t</sup> Lord Hardwicke laid it down, that if the husband, being in the receipt of the rents and profits of his wife's separate estate, buys jewels for her, they shall not be deemed her paraphernalia, but the equitable construction of the transaction shall be, that he has paid her the rents of her estate to the amount of the value of the jewels. But where the husband is in possession of the wife's separate estate as a trustee for her, he will be held accountable, and any improvement of the estate will be held to be for the benefit of the wife, the *cestui que* trust. As in *Parker v. Brooke*, the husband having got into the possession of premises which had been bequeathed to his wife for her separate use, without the intervention of a trustee, and having taken reversionary leases of them in his own name, he mortgaged the original and the reversionary leases, and afterwards died intestate. The bill was filed by his wife and child, who claimed an interest under the will against the mortgages, and against a person to whom they had agreed to assign, and against the administrators of her husband, charging the mortga-

Account of her separate estate refused to wife against husband, where he had applied it to the purposes of the family.

And where she lived with him, and had received the benefit of the expenditure of her income.

If husband buy jewels with his wife's separate estate, and gives them to her, he will be considered to have paid her to the amount of the jewels.

Husband in possession of wife's separate es-

<sup>q</sup> Sal. Cas. in Chan. 20. 2 Eq.  
Cas. Ab. 152.  
<sup>r</sup> 4 Br. C. C. 326.

<sup>s</sup> 16 Ves. 116.  
<sup>t</sup> 2 Ves. sen. 1.  
<sup>u</sup> 9 Ves. 583.

tate as trustee for her, held accountable.

gees with notice of the will, and praying that the bequests of it might be carried into execution, that the mortgages might be delivered up to be cancelled, and that an account might be taken of the profits on payment of the fines; and an account was decreed against the representatives of the husband. The rule which may be extracted from these decisions seems to be this: that if the husband receive the rents, or the interest of his wife's separate property, without her knowledge, there his executors shall be liable to account and refund; but if he receives them with her privity, and without any express dissent, that then his executors shall not be liable to any account, as it shall be construed to be a gift from the wife;<sup>v</sup> and that if the husband receive the principal of her separate estate, with or without her privity, and there be no assent on her part, the executors of the husband must pay it back.<sup>w</sup> It appears also, from these cases, that where the husband is permitted to receive the produce of his wife's separate estate, or where husband and wife live together during the time that he is so receiving it, no account whatsoever will be directed. There are, however, several other cases, in which it was held that an account would be given, under such circumstances, for one year's income.<sup>x</sup>

Husband liable to account for wife's separate estate, if taken against her will.

No assistance given to wife against

As the Court will not give a wife an account of her separate estate against the representatives of her husband, at most not beyond a year, on the ground of her supposed assent, so it would seem to follow, that if he took it against her will, a complete account would be directed against him after his death, and that, if an application were made to the Court by the wife, during his lifetime, to restrain him from receiving such property, he would be enjoined. However, if she have been guilty of adultery, and file a bill against her husband and the trustees of her separate estate, com-

<sup>v</sup> *Powel v. Hankey*, 2 P. Wms. 82.

<sup>w</sup> *Ibid.*

<sup>x</sup> *Townsend v. Windham*, 2 Ves. sen. 7. *Peacock v. Monk*, *ibid.*

190. *Parkes v. White*, 11 Ves. 225. See also Mr. Maddock's note (c) to the case of *Ex parte Elder*, 2 Mad. 286. in which all the cases on the subject are collected.



plaining that he receives the rents of it, and that the trustees pay them to him, and praying an injunction, the Court would refuse to interfere for her relief, on account of her own misconduct.<sup>y</sup>

As a married woman can deal and bargain with her husband with respect to her separate estate, so she may deal with a stranger without the privity of her husband, and even without his concurrence. In *Masters v. Fuller*,<sup>z</sup> the plaintiff had taken a lease of a house at 20*l. per annum*, and his wife agreed privately with the defendant, the landlord, to pay him an additional rent of 18*l. per annum*, if he would fit up the house in a better manner. She, accordingly, paid the rent out of her separate estate, and, after her death, the husband, as the executor of his wife, filed a bill for an account of the money paid by her to the defendant, and to have the agreement delivered up; but the Lords Commissioners dismissed the bill without calling on the counsel for the defendant.

husband taking her separate estate where she has been guilty of adultery. Wife may deal with strangers with respect to her separate estate.

And a married woman may not only deal with her husband, and a stranger, with respect to her separate property, but she may sell that property to the person who holds it in trust for her. And so it was ruled by Lord Hardwicke in *Davidson v. Gardiner*,<sup>a</sup> where a bill was filed by a married woman to set aside an assignment she had made of her interest in a brew-house, to the defendant, who held it in trust for her separate use, his Lordship dismissed the bill, it appearing that she had received full value, and no particular instances of fraud being proved. This decision affords the strongest instance of the effect produced by separate property in giving competency to a married woman to act as a *feme sole*: for Lord Hardwicke states one of the rules with respect to dealings between trustee and *cestui que trust* to be, that where a trustee for persons not *sui juris*, as infants and *femes covert*, becomes both buyer and seller, the Court will, under no circumstances whatsoever, be they never so fair between

Wife may deal with the trustee of her separate estate, and sell it to him.

<sup>y</sup> *Lee v. Lee*, 2 Dick. 806.

<sup>z</sup> 4 Br. C. C. 19. 1 Ves. jun. 513.

<sup>a</sup> Sugd. Estates, 485.

the parties, (as consulting the friends of the infant, or their refusing to purchase, or the like,) establish a purchase of that kind, unless the transaction be legitimated by the act of the Court, or by some public act. So that it appears, that separate property makes a married woman so far *sui juris*, that an act by her, which, if the property were not separate, would be rescinded, not on the ground of a legal incapacity, but of the supposed liability to imposition arising from her married state, would yet be established against her, if it were done with reference to her separate estate. So, in *Parkes v. White*,<sup>b</sup> Lord Eldon upheld a sale by husband and wife, to a person who was not only her trustee to support contingent remainders, but also a trustee for her separate use. In that case, on the intermarriage of the plaintiff and her husband, freehold estates had been conveyed to Thomas White and his heirs, to the use, after the marriage, of Catherine Parkes for life, and, after the determination of that estate, to the use of White and his heirs, during her life, to support contingent remainders, yet, nevertheless, to permit her and her assigns to receive the rents and profits during her life, for her sole and separate use, and from and after her decease, to the use of White, and his heirs and assigns, in trust, for such persons as Catherine Parkes (the plaintiff) should, by her last will in writing, notwithstanding her coverture, appoint; and if no appointment, then to her only child, his heirs and assigns, if she should leave but one living at her death; if more than one, then in trust to be sold, and the money to be equally divided amongst them at certain periods therein mentioned, with an ultimate limitation to Catherine Parkes, her heirs and assigns. Parkes and his wife conveyed the lands by fine, for valuable consideration, to a person of the name of Evans; he afterwards sold to the trustee, White, for the same sum he had paid for them; and White sold to Quarman, who had notice of the trust, for an advanced price, but paid the difference to Parkes and his wife. Mrs.

<sup>b</sup> 11 Ves. 209.

Parkes afterwards made her will, devising the lands to Quarman, the purchaser. The bill was now filed by Mrs. Parkes, by her next friend, against White, the trustee, Quarman, and her husband, to set aside all these transactions; and Lord Eldon established the sale to White, so far as her life interest extended, though he was a trustee of it for her separate use; but he directed the will to be cancelled, that Quarman, the purchaser, should convey to new trustees, to the use of himself, for the life of the plaintiff, and, after her decease, to the use of such trustees, upon the trusts declared by the marriage settlement from and after her decease, save as to the reversion, which was to be limited to Quarman and his heirs. His Lordship also directed, that the trustee, White, and Quarman, should pay the children of the plaintiff (who were made defendants) their costs.

## CHAP. XI.

OF THE SEPARATE CHARACTER WHICH A MARRIED WOMAN  
ACQUIRES FROM HER SEPARATE PROPERTY.

Married woman may sue with respect to her separate property, but not alone; she may be sued alone.

Wife suing her husband for her separate estate, sues by her next friend. Wife suing a stranger

A MARRIED woman, being thus capable in a court of equity, of possessing property to her separate use, and of disposing of it, that Court will consider her to be so far a distinct person from her husband, as to suffer her to be sued by him,<sup>a</sup> or to sue him,<sup>b</sup> or to be sued by, or to sue, any other person with respect to that property. However, she cannot institute a suit alone, as, if her husband be not joined in it with her, she must sue by her next friend, but she may defend alone, with the permission of the Court, or even without it, when she is made a defendant by her husband.<sup>c</sup> Whenever it is sought to charge the separate estate of the wife, the husband must be made a party,<sup>d</sup> but then he is a formal party,<sup>e</sup> and the wife is considered as a *feme sole* for that purpose, and must be served with process;<sup>f</sup> and she may be obliged to answer alone, where her husband is the plaintiff;<sup>g</sup> but in no instance can she be sole plaintiff, for, whether she sues for separate property, or separate maintenance, she must be joined with another. If she institutes a suit against her husband for her separate maintenance, she must do so, of course, by her *prochein ami*;<sup>h</sup> and even when she proceeds against a stranger for her separate property, it seems that her husband ought not be joined with her, but she should sue in the name of

<sup>a</sup> Prec. Chan. 24.

<sup>b</sup> Kirk v. Clark, Prec. Chan. 275.  
<sup>2</sup> Eq. Ca. Ab. 144.

<sup>c</sup> Mitf. Plead. 83. Rudiments of Law and Equity, 120. 3 Atk. 478.

<sup>d</sup> 3 Mad. 474.

<sup>e</sup> Lillia v. Airey, 1 Ves. jun. 278.

<sup>f</sup> Jones v. Harris, 9 Ves. 486.

<sup>g</sup> Prec. Chan. 24. 113. 3 Atk. 478.

<sup>h</sup> Reynes v. Lewis, 1 Chan. Cas. 35. Nelson, 88.

her *prochein ami*, and if her husband should be joined with her, the Court would order the payment to some one for her.<sup>i</sup> However, if the wife think proper, the husband may be made a co-plaintiff with her.<sup>j</sup>

for her separate property, sues by next friend.

In *Brooks v. Brooks*,<sup>k</sup> the husband sued his wife on account of her separate estate. There, Sir Robert Brooks filed a bill against his lady and others, and a motion was made to have her committed for not answering interrogatories. The Court refused it, saying, that a man could not be plaintiff against his wife. But it was moved on a subsequent day, when the Court was of opinion, that though a man could not have a bill against his wife for the discovery of her own estate, yet that where, before marriage, she had entered into articles concerning her own estate, she had made herself a separate person from her husband, and was therefore ordered to answer in a week's time. This is perhaps the strongest instance which can be given of the separate and distinct character a married woman assumes, arising from her possession of separate property; for here she was not only sued without her husband, but the husband himself was the plaintiff. So where Mr. Strangeways filed a bill against his wife, she appeared in Court, and desired that a guardian might be assigned to put in an answer for her; Lord Hardwicke was of opinion, that the husband's bringing a bill against his wife, was admitting her to be a *feme sole*, and that she should put in an answer as such, and that he never knew an instance of appointing a guardian in such a case.<sup>l</sup>

Wife ordered to answer interrogatories, on bill against her by her husband.

Wife does not answer by guardian when bill filed against her by her husband.

The case of Commissary Hyde's wife<sup>m</sup> proves, that the engagements of a married woman, with respect to her separate estate, impose a separate liability upon her; and that if her husband cannot be found within the jurisdiction of the Court, she must appear and answer alone. Mrs. Hyde, on her marriage, had her fortune, which was considerable,

<sup>i</sup> Griffith v. Hood, 2 Ves. sen. 452.

<sup>j</sup> Smith v. Myers, 3 Mad. 474.

<sup>k</sup> Prec. Chan. 24.

<sup>l</sup> Ex parte Strangeways, 3 Atk. 478.

<sup>m</sup> Prec. Chan. 328. 1 Eq. Cas. Ab. 65.

Wife arrested for want of an appearance to subpoena against husband and wife, respecting her separate estate, not discharged without appearing.

Wife obliged to answer separately respecting her separate property, her husband being out of the jurisdiction.

settled to her separate use, and when her husband, the defendant, was arrested for a debt of 2000*l.*, she undertook by a written note, that if they would discharge the action, she would pay the demand out of her separate estate. This bill was filed against husband and wife, to enforce the performance of this agreement of the wife, and a subpoena was served upon her, and she was taken upon an attachment, which had issued against both, but the husband could not be found. She moved to be discharged on the ground that her husband was gone to Rotterdam before the filing of the bill, and that, therefore, process against her alone was irregular. The Lord Keeper, Harcourt, thought the process irregular, but the Master of the Rolls, Sir John Trevor, who was consulted by the Lord Keeper, said, that it was perfectly regular, that the husband was joined merely for conformity, and that it was the constant practice of the Court of Chancery. So the defendant prayed time to answer, and on entering an appearance, and paying the costs, her motion was granted, and she was discharged. *Dubois v. Hole and Wife*<sup>n</sup> is a case of the same description, for there the defendant's wife, before her intermarriage with him, had been married to a person of the name of Dubois, and on his death she possessed herself of his personal fortune, which he had bequeathed to his nephews, the plaintiffs, and she conveyed it to trustees, so that the second husband might not intermeddle with it. The bill was filed by the nephews of the first husband against the second husband and his wife. Hole was beyond the sea, and his wife had obtained an order to put in a separate answer, but was afterwards advised, that being a *feme covert*, she could not be compelled to appear or answer, and obtained an order to refer the proceedings against her as being irregular. But the Lord Chancellor said, that according to the statement of the bill, the wife had a separate capacity, and the husband had nothing to do with the estate, and that rather than there should be a

failure of justice, he held the process against her alone to be regular, her husband being beyond the seas, and not amenable to the process of the Court. It also appears by Mr. Raithby's note to this case, that Mrs. Hole was committed to the Fleet, and stood out to a sequestration, and that being brought up to the bar of the Court on an *alias pluries habeas corpus*, the bill was taken *pro confesso* against her, and a decree accordingly, with costs.

Wife committed for want of answer respecting separate estate.

It seems, also, that a writ of *ne exeat regno* may be granted against a married woman, who is sued as executrix or administratrix, and has separate property; as in *Moore v. Meynell*,<sup>o</sup> where the plaintiff filed his bill against Sarah alone, the wife of Richard Meynell, which Sarah was the widow and administratrix of one Lawrence Crabb, deceased, for an account of the real and personal estate of the said Crabb; she was afterwards arrested on a *ne exeat regno*, and gave security thereon, and then preferred her petition to have the said writ and security discharged; and it was ordered, that on the said Sarah giving the like security, which she had given on the writ, that she would put in a full and perfect answer, she should be at liberty to depart the kingdom before she put in said answer. The cause came on to be heard against her alone, her husband not being named as a party to the suit, and a decree for an account made against her.

Wife sued alone, and arrested on a *ne exeat regno*, respecting separate property.

So in *Jerningham v. Glass*,<sup>n</sup> a motion was made for a *ne exeat regno* against the wife of Glass, who was executrix of her former husband. Glass had already gone out of the kingdom; and it was doubted by Lord Hardwicke whether it could be granted, as she was a *feme covert*, and could give no security, and it was adjourned to search for precedents, and the motion was afterwards granted on the authority of the above case of *Moore v. Meynell*. It must be observed, that it is not stated either in Mr. Raithby's or in Atkins's note of the case of *Moore v. Meynell*, that the wife had separate property; it appears, however, that she had a large

Writ of *ne exeat regno* granted against a married woman, with respect to her separate estate.

<sup>o</sup> 2 Vern. 614 by Raithby, in the notes.  
<sup>p</sup> 3 Atk. 409. Amb. 62.

Writ of *ne exeat regno*, not grantable against a married woman merely as executrix or administratrix, not having separate estate.

separate property, and that she had executed bonds, by which, it was contended, she had rendered her separate estate liable to the debt.<sup>q</sup> However, this case of *Jerningham v. Glass* has been lately over-ruled by Lord Eldon in *Pannell v. Tayler*,<sup>r</sup> when his Lordship decided that a writ of *ne exeat regno* cannot be granted against a *feme covert* administratrix. In this case, the bill was filed by the children of John Herlock against his widow and her second husband, stating that she had obtained letters of administration of the effects of the intestate; that she and her present husband had received and retained in their hands some part of the assets, to a share of which the plaintiffs were entitled; that her husband was gone to reside abroad, and that she also was about to leave the country; and the bill prayed that the writ of *ne exeat regno* might issue to restrain her from departing from the kingdom. A motion to this effect was made, and after several applications, his Lordship, having been referred to the cases of *Moore v. Meynell*, and *Jerningham v. Glass*, considered himself bound by authority, and directed the writ to issue. A motion was afterwards made on behalf of Mrs. Tayler, who had not entered an appearance, to discharge the writ, and after much discussion his Lordship discharged the writ, saying, that if he had been apprized of the circumstances of the case of *Moore v. Meynell*, he never would have granted it. The circumstances to which his Lordship adverts seem to have been, that Mrs. Meynell had a separate estate, and had executed bonds by which she had rendered her separate estate liable to the debt, facts which were stated by the counsel in *Pannell v. Tayler*, but which do not appear in Mr. Raithby's extract from the register's book. Lord Eldon, in delivering his opinion on this subject, said, "There may be a very great difference between the case of a married woman who has separate property, and the case of a married woman who is administratrix, and as administratrix can have no separate property at all." So that it seems

q See *Pannell v. Tayler*, 1 Turner, 101.  
r 1 Turner, 96.



to be settled now, that a writ of *ne exeat regno* cannot be granted against a married woman as an executrix or administratrix merely, because she has no power as such to act without her husband.

It is decided, by the case of Commissary Hyde's wife,<sup>a</sup> that if a married woman have separate property, and a bill be filed against her and her husband in respect to it, she must appear and answer without her husband, if he cannot be found; but even if the wife be not obliged to appear, and do appear alone, she cannot afterwards set aside that appearance for irregularity. In *Travers v. Buckley*,<sup>t</sup> the bill was filed against husband and wife, who were administrators, with the will annexed, of the late husband of the wife. The defendants lived in France, and were served there with a subpoena. The wife came to England, and was taken on process of contempt, which had issued against both. She gave a bail bond for her appearance, and appeared for herself only; she also applied for time to answer, and obtained an order for that purpose. Afterwards, she moved that her bail bond and her appearance should be both discharged, she being a *feme covert*, and incapable of appearing for herself; but the motion was refused, on the ground that, she having appeared, had cured the irregularity. So that this case is no authority to prove that a *feme covert* must appear alone in respect to her separate estate, or her separate character; it only proves, that when she is sued jointly with her husband, and does appear alone, she cannot complain of it as an irregular proceeding. Still, it is conceived, that no decree could have been pronounced against her alone, without her husband's appearance having been procured. No doubt, in *Dubois v. Hole and Wife*,<sup>u</sup> there was a decree against the wife only, but there was this good reason for it, that the wife alone had got possession of the property, which was the object of the suit, and had

If wife be sued jointly with her husband, and appear alone, she is bound by the appearance, and cannot set it aside for irregularity.

<sup>a</sup> Prec. Chan. 113.

<sup>t</sup> 1 Ves. sen. 384. 1 Wilson, 264.

<sup>u</sup> 2 Vern. 614. Sed vide Pan-

nell v. Tayler, 1 Turner, 101. where Lord Eldon says, the decree was against the husband alone.

vested it in trustees for the purpose of protecting it against her husband. But such a reason does not exist in *Travers v. Buckley*,<sup>v</sup> for, although the wife was joint administrator with her husband, yet it did not appear that she had ever any part of the assets in her possession, or any separate property, and, therefore, there was nothing on which a decree could attach. In *Bell v. Commissary Hyde's Wife*,<sup>w</sup> Mrs. Hyde had property distinct from her husband, upon which a decree might act, and which, according to *Dubois v. Hole and Wife* would have warranted a decree against her alone. But Lord Hardwicke, in *Travers v. Buckley*, said, that *Dubois v. Hole and Wife*, was decided, not on the ground of separate property in the wife, but because she had appeared, and had cured the irregularity of the process against her by the appearance. However, no such reason is reported to have been given by the Chancellor in *Dubois v. Hole and Wife*;<sup>x</sup> on the contrary, his Lordship distinctly assigned his reasons to be, the separate property of the wife in the object of the suit, and the absence of her husband beyond the seas. As to the appearance of Mrs. Hole, although that might have been a good reason for holding the process to be regular, yet it never could have warranted the decree pronounced against her, unless it had been stated in the bill, that she had a separate character, and a separate estate, and if a decree had not been prayed in respect to it. So that the inference to be drawn from *Dubois v. Hole and Wife*,<sup>y</sup> *Bell v. Commissary Hyde's Wife*,<sup>z</sup> and *Moore v. Meynell*,<sup>a</sup> is, that if a bill be filed against husband and wife, praying relief with respect to separate property of the wife, she must appear alone, and there may be a separate decree against her, if her husband be not amenable to the process of the Court; and *Travers v. Buckley*<sup>b</sup> establishes only this, that if the wife, in any case in which she is sued jointly with her husband, does appear without her husband, that appear-

<sup>v</sup> 1 Ves. sen. 384.

<sup>w</sup> Prec. Chan. 118.

<sup>x</sup> 2 Vern. 614.

<sup>y</sup> Ibid.

<sup>z</sup> Prec. Chan. 328.

<sup>a</sup> Cited in *Dubois v. Hole*,  
2 Vern. 614.

<sup>b</sup> 1 Ves. sen. 384.

ance cures the irregularity, which was in the process which issued to enforce such appearance, but that such appearance without any other circumstance would not authorize a decree against her alone. And all these cases united concur in establishing this proposition, that, in a court of equity, separate property in the wife confers a separate character and imposes a separate responsibility.

## BOOK IV.

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### CHAPTER I.

#### OF THE WIFE'S SEPARATE PROVISIONS.

Separate provisions of married woman, consist of pinmoney and separate maintenance.

IN addition to the interests which a married woman may possess for her separate use, and with respect to which she is empowered in a court of equity to act as if she were sole,<sup>a</sup> there is another species of property, which she may have during the marriage, as independent of her husband as if it were her separate estate, and in the enjoyment of which she will be equally protected. This class consists of two kinds, viz. pinmoney, and separate maintenance, both payable by the husband to his wife by his own agreement, and out of his own property; both capable of being settled before marriage or during the marriage; and neither capable of being disposed of by the wife by a sweeping appointment.<sup>b</sup> However, these provisions, although resembling each other in these particulars, differ essentially in other respects: for pinmoney is payable only during cohabitation, and separate maintenance, as the name imports, only during separation, the former for personal use and private expenditure, the latter for daily subsistence. There is this additional important distinction between pinmoney and separate maintenance, that, if the wife be guilty of adultery, a court of equity will not assist her in the recovery of the

<sup>a</sup> See Book III.

<sup>b</sup> *Hyde v. Price*, 3 Ves. 437.

arrears of the former,<sup>c</sup> while such misconduct will not be any bar to her recovery of the latter.<sup>d</sup>

Pinmoney is a yearly sum payable by a husband to his wife during cohabitation, either in pursuance of a settlement, or an agreement for a settlement, before marriage, or allowed by him to her gratuitously, without any previous stipulation. As this allowance is not intended for the procurement of necessaries for the wife, but merely to enable her to indulge in dress, and the ornaments of her person, and that too during cohabitation, it is natural to find that few disputes on this subject have reached our courts of law or equity during the lives of husband and wife. After his death, indeed, the question has often arisen, how far back a court of equity would extend an account of the arrears of pinmoney alleged to be due to the wife against the representatives of the husband, and the rule, almost without exception, is not to go back farther than a year.<sup>e</sup>

Pinmoney payable during cohabitation.

Separate maintenance from a husband to his wife, is the result of an agreement between them to live apart from each other, either immediately, or at a future period, for a time only, or permanently. If the separation be intended to be only temporary, then, if the husband offer to take back his wife, and to maintain her, it puts an end to the agreement, and a court of equity will not enforce the payment of the separate allowance to the wife. But if the separation be intended to be permanent, that is, during life, there, the offer of the husband to cohabit with his wife does not put an end to the contract for a separate maintenance.<sup>f</sup> And the payment of this allowance, and the performance of the other parts of the contract, are generally secured by deed. As husband and wife are incapable of contracting with each other, and the wife is incapable of contracting with any one, this engagement must be entered into by the husband with a third person, as a trustee on her part. Indeed, Lord Alvanley did, on one occasion, enforce such a contract between husband and wife only,

Separate maintenance payable during separation.

<sup>c</sup> 2 Eq. Ab. 156.  
<sup>d</sup> 13 Ves. 439.

<sup>e</sup> See Chap. II. of this Book.  
<sup>f</sup> See Chap. V. of this Book.

Parties to  
a deed of  
separation.

Necessary  
covenants  
in a deed  
of separa-  
tion.

without the intervention of a trustee;<sup>g</sup> but Lords Rosslyn<sup>h</sup> and Eldon<sup>i</sup> have expressed their strong disapprobation of this case, and it has not since been followed. The parties to this deed must be the husband and wife of the one part, and the trustee of the other, and the covenants usually inserted in it are, by the husband, that it shall be lawful for his wife to reside where she may think fit, freed from his government and restraint in all respects, as if she were a *feme sole*; that he will pay the stipulated allowance by equal quarterly payments every year during the separation; and, by trustee, that he will indemnify the husband against all such debts for maintenance, or otherwise, as the wife has already incurred, or at any time while she shall live separate and apart from her husband, and shall enjoy the proposed allowance, shall incur. This covenant to indemnify the husband against the debts his wife may contract during the separation, is, in most instances, necessary, for the purpose of supporting the instrument against creditors, which it effectually does, being held to be in itself a valuable consideration.<sup>j</sup> However, there may be circumstances belonging to a case, which would render a deed of this nature valid against creditors, even without this covenant; for, if the wife be treated so cruelly by her husband, as to entitle her to alimony in the ecclesiastical court, a deed, executed by her husband, to a trustee, covenanting for the payment of a separate maintenance to her, would be considered to be for a good and valuable consideration, although the trustee had not engaged to indemnify the husband against his wife's debts.<sup>k</sup> But, although an instrument of this description may be valid against creditors, without any covenant of indemnity being inserted in it, still, it has been doubted, whether the payment of the separate maintenance could be enforced against the husband himself, if this covenant were omitted.<sup>l</sup> It

g Guth v. Guth, 3 Br. C. C. 614.

h Legard v. Johnson, 3 Ves. 352.

i St. John v. St. John, 11 Ves.  
532.

j See Chap. III. of this Book.

k Nunn v. Willmore, 8 T. R. 521.

Hobbs v. Hull, 1 Cox's C. C. 445.

l 1 Jac. C. C. 138, 141, 142.

seems to have been doubted, also, whether the deed of separation would be valid, if it contained the hitherto usual covenant by the husband not to apply to the ecclesiastical court for a restitution of conjugal rights; as Lord Eldon, on a late discussion which occurred on this subject, said, that if he were to send the case before him to a court of law, one of the questions would be, whether such a covenant would bind?<sup>m</sup> His Lordship at the same time intimated, that if such a covenant were held to be void on grounds of public policy, it would be difficult to support the whole of a deed for the same purpose, of which it formed a part. Certainly no instance has yet occurred, in which the husband, having entered into this covenant, and having, notwithstanding, applied to the ecclesiastical court for restitution of conjugal rights, has been restrained by a court of equity;<sup>n</sup> and it seems to be clear, that if the wife, under such circumstances, should sue before the same tribunal for a similar remedy, equity would not interrupt her, because the deed is not hers; nor can she, being married, be bound by any deed of this sort. As to the ecclesiastical court, the rule of that tribunal is, not to separate husband and wife by its sentence, except in cases where cruelty or adultery have been proved; so that the deed of separation can have no effect there. In a court of law, too, if an action were brought for damages for breach of this covenant, for separation, by suing for restitution of conjugal rights, it is admitted on all sides, that it could not be sustained, as being an illegal agreement, and contrary to the policy of the law. But although equity will permit husband and wife to violate this part of their agreement, without any interference, and the ecclesiastical court will entertain a suit for restitution of conjugal rights, notwithstanding this covenant, and a court of law will not suffer an action to be maintained upon it; yet if the husband attempt a forcible assertion of his marital authority over the person of his wife, the same jurisdiction, viz. the court of law, will, to the

Ecclesiastical court will not separate husband and wife, unless cruelty or adultery proved.

Courts of law will discharge wife when seized by her husband in violation of deed of separation.

<sup>m</sup> Westmeath v. Westmeath, 1 Jac. C. C. 136.      <sup>n</sup> 2 Cox's C. C. 107.

extent of its power, restrain him ; for, if a husband, having executed a covenant of this nature, should seize the person of his wife, and require her to cohabit with him, a court of law would set her at liberty, and would leave it to her choice to reside with him or not, as she pleased.<sup>o</sup> So that the law upon this subject stands in this very peculiar state, that if there be a covenant by which the husband engages to leave his wife free to reside where she likes, a court of equity will not enforce it, nor will it restrain the husband from violating it ; that a court of law will not entertain an action founded on the breach of it, though the very same court would enforce the due observance of it ; and that the spiritual court may pronounce a sentence for the restitution of those very rights which the legal tribunal had declared the husband to have renounced beyond the power of revocation.<sup>p</sup> These are difficulties arising from the different remedies which may be given by different jurisdictions upon the same subject matter, which, even supposing the agreement between husband and wife for separation and a separate maintenance to be perfectly valid, must introduce some embarrassment in the administration of the rights springing from such contracts.

These are the covenants of which the deed for separation and a separate maintenance is generally composed, and such are the objections which have been made to the omission of some of them, and to the insertion of others ; but, not only particular parts of this deed have been objected to, but the whole instrument has been impeached as invalid, and incapable of being the foundation of a suit at law or in equity. — When these contracts first became the subject of discussion in our courts, there does not appear to have been the slightest doubt entertained of their legality ; on the contrary, they were received, and the payment of the separate maintenance was enforced without the least difficulty on this ground ; but after they had been acquiesced in and acknowledged to be the law for more than a century, an



objection was at length taken to them, on the ground that they were immoral in their tendency, and illegal. This point was made in the case of *Rodney v. Chambers*,<sup>q</sup> where the contract was for the payment by the husband of a separate maintenance to his wife, in the event of a future separation between them, with the consent of trustees, and an objection was taken to the declaration on the above ground, when the Court of King's Bench, having heard the question fully discussed, ruled, that such agreements were valid. Notwithstanding this solemn decision, Lord Eldon, in two years afterwards, expressed a strong opinion, supported by very powerful reasoning, against the validity of an agreement precisely similar in its provisions, being for a separate maintenance in the event of a future separation, with the consent of trustees. His Lordship said, "If this were *res integra*, untouched by dictum or decision, I would not have permitted such a covenant to be the foundation of an action, or a suit, in this court; but, if dicta had followed dicta, or decision had followed decision, to the extent of settling the law, I cannot, on any doubt of mine as to what ought originally to have been the decision, shake what is the settled law upon the subject. It is better that the case should go to the House of Lords, than that the law should remain in this state upon a point connected with the very well-being of society."<sup>r</sup>

Deeds of separation and separate maintenance now held to be legal.

This is an express recognition of the legality of contracts for separation and separate maintenance, accompanied by a strong declaration of his Lordship's disapprobation that the law was so settled. This dissent from the doctrine, proceeding from such a quarter, and founded on reasoning much more easily answered by the number of the authorities, than by the strength of the arguments, has naturally led to subsequent attempts, at law and in equity, to disturb, not only the judgment in *Rodney v. Chambers*, but to question the legality of any contract between husband and wife,

<sup>q</sup> 2 East, 283.

<sup>r</sup> 11 Ves. 537.

even through the medium of a trustee, for a separation of any kind, whether present or prospective. These attempts have been made in equity, successively, before Sir William Grant, Sir Thomas Plumer, Sir John Leach, and before Lord Eldon himself, and have failed. In *Westmeath v. Westmeath*,<sup>s</sup> which was heard before Lord Eldon, his Lordship said, "The conclusion I come to is, that though I might have decided differently if I had been one of the common law judges formerly, yet that it is impossible for me now to take upon myself to say, that these deeds are not good at law." The same question was raised in the equity side of the Exchequer, upon a demurrer to a bill for the arrears of a separate maintenance secured by deed upon a separation, and the demurrer was overruled, the Chief Baron Richards saying, "If we allowed the demurrer, we should overrule very solemn decisions. The question is certainly one of which great doubt has been entertained, and opinions have been expressed by judges, disapproving of the doctrine now settled and established, on which suits founded on articles of separation have been maintained. I am of opinion, with Lords Eldon and Loughborough, that it would have been well if such contracts had not been held binding for any purpose; but the question is not what the law ought to be, but what it is; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point, and settling the law." The point was raised also at the law side of the Exchequer, and decided in favour of these contracts; and although the judgment was afterwards reversed in the Court of Exchequer Chamber,<sup>t</sup> yet the reversal turned upon the peculiar nature of the agreement in that case, and not upon the illegality of such contracts in general. For Chief Justice Abbott, speaking of *Durand v. Titley*, said, "It was a case by itself, and distinguishable from all that preceded it. The ground of the decision given by Lord Chief Justice Dallas and myself, there, was, that the

<sup>s</sup> 1 Jac. C. C. 143.

<sup>t</sup> *Durand v. Titley*, 7 Price, 577.

agreement was for a future separation at *the sole pleasure* of the wife, the parties being, at the time of making the agreement, living together and in amity." So that this case is an authority favourable to the legality of contracts, even for future separation and separate maintenance, where the separation is not made to depend on the sole will of the wife. There are three other cases at law, in which the same experiment was tried, viz. *Jee v. Thurlow*,<sup>u</sup> *Scholey v. Goodman*,<sup>v</sup> and *Lessee M'Donnell v. Murphy*.<sup>w</sup> In the second case there was no decision, but in the first and third, the validity of these contracts was directly put in issue, and supported, Mr. Justice Bayley saying, in the former, "A system of jurisprudence so long acted on, as that which has held deeds of separation made with the approbation of trustees, and not prospective in their nature, as valid and binding instruments, cannot be overturned upon a vague notion, that it is inconsistent with public policy. This Court, after the numerous authorities which have declared such deeds legal, is not competent even to inquire whether they are so or not. The House of Lords is the proper tribunal for such an inquiry, and thither the case may be carried for further discussion on this point." And, in the latter case, which was argued in the King's Bench, in Ireland, Bushe, Chief Justice, in pronouncing the judgment of the Court, said, "This multitude of decisions seems to have established a general rule, to which the case of *Durand v. Titley* is only an exception, by reason of its peculiar circumstances, from which it follows, that such separation deeds as that now before us, whatever might be suggested if the subject were *res integra*, are now, to use the expression of Lord Ellenborough, in *Rodney v. Chambers*, 'inveterate in the law, and cannot be questioned.' "

These decisions seem to place beyond doubt the legality of deeds of separation, and separate maintenance, where the separation is not made to depend on the sole will of the wife,

<sup>u</sup> 4 Dow & Ry. 11. 2 Bar. & Cress. 547.

<sup>v</sup> 1 Car. 36. 1 Bing. 349.  
<sup>w</sup> 2 Fox & Smith, 279.

and lead to the hope that the question is now laid at rest. However, it must be acknowledged, that these instruments are composed of very discordant materials, which may give rise to very opposite and contradictory decisions. The chief object of these deeds is the separation of husband and wife, and the covenant for the payment of the separate maintenance to her is only secondary to the attainment of this principal purpose. It is admitted on all sides, that this object is illegal, and, consequently, that no court of law or equity will give effect to it, (except where the husband uses forcible means to seize the person of his wife, when a court of law has interfered,<sup>x</sup>) and yet the covenant for payment of the separate maintenance, which is entered into to enable the parties to place themselves in this illegal state of separation, is held to be legal, and capable of being enforced at law and in equity. The union of two such covenants in the same instrument, and their respective effects, has been observed upon by Sir William Grant, with his usual strength and perspicuity. His Honour says, "I apprehend it to be now settled, that this Court will not carry into execution articles of separation between husband and wife. It recognises no power in them to vary the rights and duties growing out of the marriage contract, or to effect, at their pleasure, a partial dissolution of that contract. It should seem to follow, that the Court would not acknowledge the validity of any stipulation, that is merely accessory to an agreement for separation. The object of the covenants between the husband and the trustee, is to give efficacy to the agreement between the husband and the wife; and it does seem rather strange, that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law. It has, however, been held, that engagements entered into between husband and a third party shall be held valid and binding, although they originate out of, and relate to, that unauthorized state, in which the husband and wife have endeavoured to

<sup>x</sup> See Chap. VI. of this Book.

place themselves." That this auxiliary agreement should be enforced, as Sir William Grant observes, while the principal agreement is held to be contrary to the spirit and the policy of the law, is certainly an anomaly in our system ; but it has received the sanction of so great a length of time, and of so many great names, that it may be now safely pronounced to be the settled law of the land ; and, if an alteration in it in this respect could be effected, it may be doubted whether the change would be beneficial.

## CHAP. II.

## OF PINMONEY.

**Pinmoney**  
an allow-  
ance by  
the hus-  
band to his  
wife, for  
her private  
expendi-  
ture.

**Pinmoney**  
payable  
during co-  
habitation.

**Account of**  
**pinmoney**  
**never car-**  
**ried back**  
**beyond a**  
**year, as a**

**PINMONEY** is an annual income settled, or agreed to be settled, before marriage, by the husband, on his intended wife, or allowed by him to her, after marriage, gratuitously, for her personal and private expenditure, viz. for clothes and ornaments of her person during the coverture. This provision is usually secured, like a jointure, by the creation of a long term of years, vested in trustees, by whose aid she may recover the arrears of it whenever they shall be withheld. However, as pinmoney is an allowance always payable during the cohabitation of husband and wife, few questions have arisen during their joint lives, which have become the subject of judicial determination. It is mostly after the death of one or both of the parties, that disputes take place with respect to the arrears of the pinmoney; as between the widow and the representatives of her husband, or, after the death of both, when the wife had been the survivor, between her representatives and his. But there is very great reluctance in courts of equity to institute any account, after the death of husband or wife, of moneys received by either of them during the coverture; and, accordingly, to prevent such accounts in the case of pinmoney, a rule has been laid down, that they shall never be carried back beyond a year.<sup>a</sup> And the reason assigned for limiting the account to one year, is, that if the wife have suffered her pinmoney to run in arrear, it is to be supposed, not only that she has given the arrears up to her

<sup>a</sup> *Aston v. Aston*, 1 Ves. sen. 267. *Townshend v. Windham*,

2 Ves. sen. 7. *Peacock v. Monk*, 2 Ves. sen. 190.

husband, but that, having lived with him, she has received satisfaction in that way.<sup>b</sup> In *Offley v. Offley*,<sup>c</sup> a term had been created for raising 200*l. per annum* for pinmoney for Mrs. Offley, which had been regularly paid to her by her husband's steward, except only the last year before his death, which was in arrear; and in the settlement was a covenant on the part of the husband for the payment of it. The Court was of opinion, that this, being an arrear only for one year, and there being a covenant for the payment of it, should be such a debt as should be charged on his trust estate settled for the payment of his debts; but that it would be otherwise if it had been in arrear for several years. But then the presumption arising from the non-payment of the arrears of pinmoney, namely, that the wife has released them to her husband, may be rebutted, and the transaction may be explained by proof that no such occurrence had taken place. As, for instance, if the wife had demanded her pinmoney from her husband, or the trustees, as it became due, and that such demand could be proved, it would negative the presumption of an acquiescence on her part. In *Powel v. Hankey*,<sup>d</sup> Lord Macclesfield, and in *Thomas v. Bennet*,<sup>e</sup> Lord Chancellor King, stated the law to be, that, if the wife had not demanded her pinmoney for several years together, it should be construed as a consent from her that her husband should receive it; from which it may be inferred, that if there had been a demand, no such presumption could have been raised. And, although a wife may enforce the payment of this allowance by the assistance of her trustees, still it seems, that her abstaining from the adoption of such a remedy would not be construed into a surrender of her right, as it would be too much to expect, that a wife, living with her husband, should have recourse to so strong a measure for the enforcement of the clearest right.

And even if the wife accept a payment short of what she

release,  
will be  
presumed..

Presump-  
tion of re-  
lease of  
pinmoney,  
may be ne-  
gated by  
proof of  
demand.

<sup>b</sup> *Aston v. Aston*, 1 Ves. sen. 267.

<sup>c</sup> *Prec. Chan.* 26.

<sup>d</sup> 2 P. Wms. 84.

<sup>e</sup> 2 P. Wms. 341.

is entitled to, or lets the husband receive what she has a right to receive to her separate use, it will not bar her right to the arrears of her pinmoney, where it has been proved, that she often complained to her husband of the insufficient payments, and that he promised she should have it at last. Accordingly, where 300*l. per annum* had been settled for pinmoney, and 200*l. per annum* only paid for several years before the husband's death, Lord Hardwicke decreed the payment of the arrears, under the above circumstances.<sup>f</sup>

Arrears of pinmoney not allowed, where the husband has provided the wife with the articles for which the allowance was settled.

So the wife's claim to the arrears of her pinmoney beyond a year will be disallowed, not only where she has not demanded them, but she will be altogether barred of any portion of them, even for a year, where she has been supplied by her husband, during the period for which the arrears are sought, with the articles for which the allowance was intended, as with dress and ornaments, and so it was laid down by Lord Macclesfield.<sup>g</sup> And in like manner, in *Thomas v. Bennet*,<sup>h</sup> where, upon a marriage settlement, pinmoney had been reserved for the wife, viz. 50*l. per annum* for her apparel and private expenses, secured by a term for years, and, after the death of husband and wife, her executors demand ten years' arrears; it appearing that the husband had maintained her, and, on the other hand there being no proof that she had ever demanded the pinmoney, the claim was disallowed. And in *Fowler v. Fowler*,<sup>i</sup> Lord Chancellor Talbot held, "Where pinmoney is secured to the wife, and it appears, that the husband, notwithstanding, provides the wife with clothes and other necessaries, this, during such time as the wife is so provided for by the husband, will be a bar to any demand for any arrears of her pinmoney. And there is good sense in these decisions, because the object of pinmoney being to supply clothes and ornaments to a wife, when her husband provides these things for her and she accepts of them, it must be taken

<sup>f</sup> *Ridout v. Lewis*, 269.

<sup>h</sup> 2 P. Wms. 341.

<sup>g</sup> *Powel v. Hankey*, 2 P. Wms.

<sup>i</sup> 3 P. Wms. 355.



to be a satisfaction of her claim, and that she agrees to such payment. But if the wife have been in an unsound state of mind, and, therefore, incapable of consenting, the case does not come within the rule by which the Court is governed in those instances, and she would be entitled to her full arrears;<sup>j</sup> for the husband, not being charged with more than one year's income of the pinmoney, upon the notion of her agreement to make it a common fund for the expense of the family, that notion cannot exist when the person supposed to have entered into the agreement was incapable of doing so.

Wife entitled to arrears of pinmoney accrued during her insanity

But the strictness of this rule, giving the wife only one year of the arrears of her income, after the death of her husband, has been sometimes relaxed under particular circumstances. As, in *Lady Warwick v. Edwards*,<sup>k</sup> where, previous to marriage, the Earl of Warwick made a settlement to the use of two trustees for ninety-nine years, in trust to pay the Countess 400*l.* quarterly, by way of pinmoney, and afterwards died, having no personal assets; but having charged his real estate, which was only a reversion in fee, with payment of debts. There was an arrear, at the time of his death, of one year and three quarters of pinmoney due to his widow, which the Court allowed to her, in regard she and her husband had lived well together. In this case, the allowance of pinmoney had been made by settlement before marriage; but if the allowance had been merely gratuitous after marriage, it seems that the arrears would not have been paid out of the real estate, though it had been charged with payment of debts. As in *Cornwall v. Earl of Montague*,<sup>l</sup> where the husband allowed his wife pinmoney, which being in arrear, he gave her a note to this purpose, "I am indebted to my wife 100*l.*, which became due to her on such a day." After, by his will, he makes provision out of his lands for payment of all his debts; and the Lord Keeper decreed, that the 100*l.* was not

<sup>j</sup> See the judgment of Lord Eldon in *Brodie v. Barry*, 2 Ves. & Beam. 30.

<sup>k</sup> 1 Eq. Ab. 140.  
<sup>l</sup> 1 Eq. Ca. Ab. 66.

payable within this trust, because, in point of law, it was no debt, because a man cannot be indebted to his wife ; and it was not money due to any in trust for her.

In all these instances, where an account of pinmoney was refused further back than one year, the demand was made by the wife, or her representatives, against the representatives of the husband. But, it is to be presumed, that if the wife should call for the arrears of this annuity in the lifetime of her husband, a court of equity would deal with her exactly in the same way as if she had made the same demand after his death, that is, would refuse more than the year's arrears, unless she could prove that she had demanded them, and that they had been refused to her, or unless she could give some sufficient reason for not demanding them ; and, it is equally certain, that the Court would not give her any part, if her husband had supplied her with the articles which it was the intent of the allowance to procure.

Equity  
will not assist in the  
recovery  
of pinmoney for  
wife guilty  
of adultery, or who  
has eloped.

But there are other grounds on which a Court will not only refuse to assist the wife in recovering the arrears of her pinmoney in the lifetime of her husband, but will prevent her trustees, by injunction, from using their legal remedies for the recovery of it. And these are, first, if the wife be guilty of criminal conversation;<sup>m</sup> secondly, if she elope from her husband without good cause. The injunction, however, on the ground of adultery, would be granted only in a case where that offence was plainly put in issue in the cause, and plainly proved.<sup>n</sup> And if she have left her husband in consequence of ill usage, or other reasonable grounds, or the husband have acquiesced in her departure, equity will not interpose.

Pinmoney  
not separate estate,  
and wife  
cannot  
make a

Although pinmoney be a provision for a married woman, in its nature separate, yet, it must be recollected, that it is not that kind of property which gives her the power of a *feme sole* with respect to it. She cannot convey, or in any

<sup>m</sup> Sir R. More v. Earl of Scarborough, 2 Eq. Ca. Ab. 156.

<sup>n</sup> See Lord Hardwicke's judg-

ment in Moore v. Moore, 1 Atk. 276.

other way dispose of her interest in it to a third person. She may, indeed, bestow the gales as she receives them, but she cannot make a total disposition of the entire annuity. Equity would not enforce or sustain such an act, because it would defeat the very intent and object of the first creation of the allowance, it being for the private expense and personal use of the wife.

sweeping  
disposition  
of it.

## CHAP. III.

OF THE NATURE OF SEPARATE MAINTENANCE; AND OF THE  
DEEDS BY WHICH IT IS SECURED.

Separate maintenance, a provision by the husband for the wife while they live apart.

Separate maintenance cannot be sued for during cohabitation.

Wife cannot make a sweeping disposition of separate maintenance.

A SEPARATE maintenance is that provision which a husband makes for the support of his wife, when he and she have agreed to separate, and to live apart from each other. This allowance is like pinmoney in this respect, that it is payable only during the marriage: but it so far differs from it, that pinmoney is payable only during cohabitation, while separate maintenance is to be paid during the period of separation between husband and wife, as their living asunder is always the motive, and the consideration of such a settlement; and, accordingly, it has been decided, that it cannot be sued for during cohabitation.<sup>a</sup> But, though this provision is to be paid at a time during which the husband voluntarily separates himself from his wife, and seems to renounce all the rights of marriage, still she is not thereby so far rendered a *feme sole* with respect to it, as to be enabled to make any disposition of it, except as it becomes due, and as she receives it. And so it was decided in the case of *Hyde v. Price*,<sup>b</sup> where the husband and wife having agreed to live separate, he executed a deed of separation, in which he covenanted with trustees to pay a certain allowance for the support and maintenance of his wife during his and her jointures. Mrs. Price (the wife) afterwards granted an annuity out of this separate maintenance to Hyde, the plaintiff, who filed a bill, praying an account of the dividends in respect of certain bank an-

<sup>a</sup> Sir T. Seymour's case. 4 Vin. Ab. 176. Godb. 215. Mod. 874.

<sup>b</sup> 3 Ves. 437.

nuities, which had been vested in the hands of trustees, as the fund for the payment of the maintenance, and that the fund might be transferred to the accountant-general, and that what should be found due to the plaintiff, and the future payments from time to time, might be paid out of the dividends and interest of the said stock. His Honour the Master of the Rolls dismissed the bill, so far as it sought payment of the annuity out of the fund during the life of Mary Price, giving it as his opinion, "That the separate maintenance was not property she was entitled to for her sole and separate use; that there was a special trust in it, being appropriated and destined by her husband for her support. That she had no dominion over it; that her grant was in defiance of the deed, and, therefore, could not be enforced in a court of equity."

. But if a wife, living apart from her husband, and having a separate maintenance from him, contracts debts, and will not pay them, it seems, that her creditors may follow the separate maintenance, and attach it by bill in equity. And such was the opinion delivered by the Lord Keeper, in *Kenge v. Delaval*.<sup>c</sup> There Sir Ralph Delaval and his lady had agreed to live apart by reason of some contents, and there was a separate maintenance settled on the lady, determinable on the death of either of them. After Sir Ralph's death, the creditors filed their bill, by which they sought to subject Lady Delaval's jointure to the payment of their debt. The Lord Keeper said, "Had the separate maintenance continued, there might be some reason to follow that, and make it liable to their satisfaction; but, that being determined by the death of the husband, I do not see which way the jointure can be charged with it." It is apprehended, that this opinion of the Lord Keeper is to be understood of debts contracted for necessaries only; for, if a married woman could charge her separate maintenance to any extent, then it would give her the power denied to her by the decision in *Hyde v. Price*,<sup>d</sup> namely, of

<sup>c</sup> 1 Vern. 326.

<sup>d</sup> 3 Ves. 437.

disposing of the entire of that fund, and leaving herself destitute of the means of subsistence. And the debts of a married woman for necessities ought to be liens on her separate maintenance in a court of equity, although they would not be so considered with respect to her separate estate ;<sup>o</sup> because, as the former allowance, in its original destination, was intended solely for the purpose of her support, it would be inequitable, that the fair creditor, who had, perhaps, given her credit on the security of this fund, should not have relief in this shape.

The husband is liable to the debts of his wife for necessities, when he cohabits with her, though she should have an estate ever so considerable to her separate use ; but he is not liable to the debts of a wife, even for necessities, when she lives apart from him, and has a suitable separate maintenance settled on her and paid by him, nor is she herself liable for such debts ; and, therefore, it is just, that her creditor should be enabled to follow into a court of equity the means of payment, which have been vested in trust for that purpose.

Creditor of wife may attach her separate maintenance in equity, but not beyond the amount of the maintenance.

But, though the creditor has a right to proceed against the separate maintenance of the wife, and against the husband as allowing it to her, yet if, with a knowledge of her separate allowance, he gives her credit beyond its extent, he cannot recover the difference from the husband. And so it was held in *Lillia v. Airey*,<sup>f</sup> where Mrs. Airey, being entitled, under articles of separation from her husband, to 80*l. per annum*, went to lodge with the plaintiff, with whom she continued for eight years ; and the bill was filed by Mrs. Lillia for an account of what was due to her for lodging and other necessities, and to have a receiver appointed of the profits of Mrs. Airey's separate maintenance, and to be paid her demand out of them, with costs, and for an injunction to prevent any conveyance of her estate. The demand of the plaintiff exceeded the amount of the allow-

<sup>o</sup> *Greatly v. Noble and others*, 3 Mad. Rep. 79.  
<sup>f</sup> 1 Ves. jun. 277.

ance, and the bill was dismissed ; the Lord Chancellor saying, that, " Upon the question whether a creditor has a right against the separate estate of a wife, and against the husband as allowing it to her, my opinion is, that, *prima facie*, a creditor has such a right. The question here is, whether the plaintiff did not advance to her wantonly ? In point of equity, as far as her separate maintenance goes, her creditors have a right to be paid in equity, though, in point of law, she is not otherwise a *feme sole*. But it is out of all sight to go upon the husband beyond her separate allowance, when the plaintiff, knowing she had a separate allowance from her husband, suffered her to run in debt beyond that. She cannot possibly go beyond it. The husband is more a formal party than any thing else, for the plaintiff really goes against the wife in respect of her separate estate." So that these two cases seem to establish the liability of the wife's separate maintenance to her debts for necessaries to the extent of it, and that a court of equity will apply it to that use.

But this liability of the wife's separate maintenance has been lately held not to extend to her general engagements, but to be limited to her express contracts in writing. It was so decided in *Stuart and Wife v. Lord Kirkwall*,<sup>s</sup> where the bill was filed by a milliner and her husband, stating, that a bill of exchange had been accepted by Lady Kirkwall, one of the defendants, who had lived separate from her husband, and had a separate maintenance of 1600*l.* *per annum* secured to her by deed, which was duly paid quarterly to her ; and they prayed that an account might be decreed of what was due of the annuity by the trustees in the deed, (who were also defendants,) and that they might be decreed to pay the plaintiff's demand out of what shall appear due from them, and out of the future growing payments of the said annuity, &c. &c. The only question made in the case was, whether Lady Kirkwall could affect this separate maintenance by accepting a bill of exchange ?

Liability of wife's separate maintenance to her engagements, confined to her express engagements.

and the Vice Chancellor's judgment was, "I had occasion to consider this doctrine in the case of *Greatly v. Noble*.<sup>h</sup> I then was, and now am of opinion, that a *feme covert* being incapable of contract, this Court cannot subject her separate property to general demands; but that as incident to the power of enjoyment of separate property, she has a power to appoint it; and that this Court will consider a security executed by her as an appointment *pro tanto* of her separate estate."

The money sought to be recovered in the above case was only 339*l.* 14*s.* 6*d.*, for millinery, and the separate allowance was 1600 *per annum*; so that the case establishes only this proposition, that where the wife, having a separate maintenance, executes a security for necessities, she renders that provision liable to the amount of the demand. But it is apprehended, that it was not intended to decide that a security for any purpose, or to any amount, would be recoverable out of such an estate, because that would be in effect to decide, that a married woman could make a sweeping appointment of her separate maintenance, which was given to her for her support during separation from her husband, and would therefore be to overrule the case of *Hyde v. Price*,<sup>i</sup> in which it was held that a married woman had no such dominion over this species of property. It is true, a woman may exercise this power over her separate estate, which she has to her sole and separate use, but separate maintenance is not of this description,<sup>j</sup> because it is destined for the particular purpose of maintaining her while she lives apart from her husband, and therefore cannot be diverted from it. The Vice Chancellor applies his observations in the above case to separate property only; but they must be understood to include also that kind of separate property, viz. separate maintenance, which was then the subject of discussion.

Separate  
mainte-  
nance will

The principal object of a separate maintenance being that a wife should receive subsistence from day to day, has

<sup>h</sup> 3 Mad. 79.  
<sup>i</sup> 3 Ves. 437.

<sup>j</sup> *Hyde v. Price*, 3 Ves. 437.



given rise to a peculiarity which does not belong to any other species of annual income, and that is, that if the annuitant should die before a gale day, that allowance shall be apportioned : and so it was ruled in the Court of Common Pleas, in the case of *Howel v. Stanforth*.<sup>k</sup> There the defendant had given his bond for 1800*l.*, conditioned to pay 80*l.* *per annum*, quarterly, to his wife or her trustee, provided that she did not disturb or molest her husband. Judgment was entered on this bond, and a *fiery facias* having issued, the Court ordered that the judgment should stand as a security for future arrears, with liberty to apply to the Court from time to time to sue out fresh execution thereon. The wife, the annuitant, having afterwards died, Sergeant Adair moved for leave to take out execution for the proportional arrears of the annuity since the last quarter day, which motion was opposed ; but Chief Justice De Grey, and the whole Court, agreed, that, " Though rents and common annuities are not apportionable either by law or equity, yet in equity the maintenance of infants is always apportioned up to the day of their deaths,<sup>l</sup> &c. because it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of the quarter ; that this case depended on similar principles, the annuity being for a separate maintenance to a *feme covert* ; and as it appeared that the quarterly payments were not originally forward payments by way of maintenance for the ensuing quarter, (which might make a difference,) but payable at the end of each quarter, in order to discharge the expenses incurred in the three preceding months, and, therefore, that it ought to be apportioned."

be apportioned, if wife die before the gale day.

A separate maintenance is generally secured by deed, in which, as a married woman is incapable of contracting with any one, a trustee covenants on her part. The instrument recites the existing differences between the husband and his wife, and their agreement to live apart, the husband covenanting to permit her to live apart from him,

<sup>k</sup> 2 Sir W. Black. 843. 1016.

<sup>l</sup> Hay v. Palmer, 2 P. Wms. 501.

not to sue her in the ecclesiastical court for restitution of conjugal rights, and to pay her a certain sum at stipulated periods during the separation. On the other hand, the trustee covenants, in consideration of the premises, that he will indemnify the husband against all debts which the wife shall contract during the separation. This latter covenant to indemnify the husband against his wife's debts, is of great importance in contracts of this nature, and ought never to be omitted, as it gives protection both to the husband and the wife : it indemnifies the husband against any claims of her creditors, whatever the amount of the allowance may be, and however unsuitable to his means and station in life ; and it affords protection to the wife also, because it is now settled, that such a covenant is not only a good but a valuable consideration, and would take a conveyance out of the statutes relating to voluntary and fraudulent conveyance.<sup>m</sup> In *Stephens v. Olive*,<sup>n</sup> one of the objects of the

In a settlement for separate maintenance, a covenant by trustees to indemnify husband against wife's debts, is a valuable consideration.

bill was to set aside a settlement made by husband on his wife, through the medium of trustees, for her separate maintenance during separation, on the ground that the husband was indebted by bond to the plaintiff previous to the settlement. There was a covenant in the deed by the trustees to indemnify the husband against the debts his wife might contract after the separation ; and his Honour, Sir Lloyd Kenyon, held, " that the covenant by the trustee to indemnify the husband against the debts which the wife might contract after the separation, was a valuable consideration ; and therefore, that this settlement, although made after the debt due to the plaintiff was contracted, was also good against him : " and a similar decision was made in the case of the *King v. Brewer*,<sup>o</sup> by Lord Loughborough. This was an issue on a traverse to an inquisition on an outlawry, which came on to be tried at the Chelmsford assizes. It appeared in the case that a husband had, after his marriage, upon an agreement between him and his wife to live separate, conveyed his estate to trustees for the maintenance of

In settlement for separate maintenance, covenant by

<sup>m</sup> 13 & 27 Eliz. 1 Jac. 1. c. 15.  
<sup>n</sup> 2 Br. C. C. 90.

<sup>o</sup> In a note to *Stephens v. Oliver*,  
2 Br. C. C. 93.

his wife, and that the trustees had covenanted to indemnify the husband against her debts. It was objected, that this conveyance was within the statute of Elizabeth against fraudulent conveyances. Lord Loughborough said, that the statute operated upon conveyances made by the husband to the wife after marriage; but that this was a deed made upon a valuable consideration, the trustees undertaking to indemnify the husband against the debts of the wife, which was a sufficient valuable consideration to take it out of the statute. Mr. Justice Buller expressed the same opinion in *Compton v. Collinson*;<sup>p</sup> and in *Worrall v. Jacob and another*,<sup>q</sup> Sir William Grant decided the same point upon the authority of these cases. In this last case, the husband, who was a trader, had, upon the occasion of a separation between him and his wife, covenanted with a trustee to pay her an annuity of 70*l. per annum*, and to convey his contingent estate in fee, which he had in lands which had been originally her property, to such person as she should by deed or will appoint. The trustee, on his part, covenanted to indemnify the husband against the wife's debts, and against any demand for alimony which she might at any time make. The husband became a bankrupt, the wife appointed to the plaintiffs, and died; the husband then died, and the question was between the appointees of the wife and the assignees of the bankrupt, the latter contending, that the deed was void within the meaning of the 1 Jac. 1. c. 15. sec. 5.; but his Honour held, the covenant by the trustee to indemnify against the wife's debts was a sufficient valuable consideration within that statute, observing, that "a covenant of indemnity, even against debts, had been so often held to amount to a valuable consideration, that he did not think himself at liberty to treat it as an open question." Lord Hardwicke also intimated an opinion of the same kind as to the effect of this covenant, although he did not decide the question, as there was no such covenant in the deed before him. In *Fitzer v. Fitzer*,<sup>r</sup> the husband

trustee of wife to indemnify husband against her debts, takes it out of statute against fraudulent conveyances.

In a settlement for separate maintenance by a trader, covenant to indemnify husband against wife's debts, takes it out of 1 Jac. 1. c. 15. s. 5.

<sup>p</sup> 2 Br. C. C. 286.  
<sup>q</sup> 3 Meriv. 256.

<sup>r</sup> 2 Atk. 511.

Where no covenant to indemnify in a deed for separate maintenance, it will be fraudulent against creditors.

had covenanted to pay a separate maintenance to his wife and daughter upon a separation. He afterwards became insolvent, and the bill was filed by the wife and daughter against the husband and his assignee, to whom the insolvent's effects had been assigned under the insolvent debtors' act, to have the trust of the deed for separate maintenance performed. There was no covenant by a trustee to indemnify the husband against the wife's debts ; and Lord Hardwicke held the deed to be fraudulent against the creditors, saying, " This case stands quite naked and abstracted from any cases where there may be a covenant by relations of the wife to indemnify the husband against debts of the wife ; but I will not now determine what the construction of even such a deed would be with regard to the husband's creditors."

*Quære.* Is a deed for separate maintenance valid against the husband himself, when it does not contain a covenant by a trustee to indemnify against wife's debts?

In these cases, the question was between the wife and her husband's assignees ; and it has been doubted whether this covenant is not necessary, even where it is sought to enforce the deed for a separate maintenance against the husband himself. In *Westmeath v. Westmeath*,<sup>s</sup> where the husband sought to restrain proceedings at law against him by his wife for the recovery of an annuity secured to her by a deed of separation, one of the objections taken to the deed was, that it did not contain this covenant to indemnify. It was answered by the other side, that the only effect of omitting such a covenant, was to render the deed voluntary as against creditors. But Lord Eldon said, that if not bound by decisions, he should say it was impossible to show that it ought originally to have made any difference, whether there was, or was not, such a covenant. " But (added his Lordship) I cannot say that it will not, for if those who have gone before me have thought that it would, I must give to it the same effect which it had upon their judgments ; and from what I have heard them say in conversations that I recollect, I think it would have made a material difference with both Lord Kenyon and Lord Thurlow. I remember,

too, conversing on the subject with Lord C. B. Eyre: he said he never would have decided as he had, but for the covenant by the trustees." In *Elworthy v. Bird*,<sup>t</sup> the Vice-Chancellor seemed to think this covenant essential, even where creditors were out of the case; for he says, "in as much as these articles contain a covenant to indemnify, there can be no question that this Court will enforce that stipulation against the husband. However, in a case<sup>u</sup> which was decided in the following year, where a general demurrer was taken to a bill praying payment by the administrators of the deceased husband of a separate maintenance secured by a deed of separation, the objections were, 1st, That the deed was against public policy; 2dly, That it did not contain a covenant to indemnify the husband: and the Lord C. B. Richards said, speaking of the want of this covenant, "I cannot consider that circumstance as affecting this question, because, if the contract were integrally bad, such an indemnity would not make it good." However, it has been usual to insert such a covenant in deeds of separation,<sup>v</sup> and, unless under particular circumstances, it cannot be safely omitted.

But, there may be facts connected with the execution of a settlement by a husband on his wife on the occasion of a separation between them, which would render the deed valid even against creditors, though there were no covenant of indemnity by trustees in it; for, if the conduct of the husband have been such, as that the wife would have been entitled to a divorce in the spiritual court, and to alimony in consequence of that divorce, such instrument would be held to be upon a good consideration. In *Nun v. Wils-  
more*,<sup>w</sup> the deed recited that the wife had been ill-treated by her husband, and that, in order to put an end to all differences between them, and that he might no longer ill-treat his wife, in consideration of 200*l.* he conveyed all his effects to trustees in trust to dispose of the property; and

When deed for separate maintenance will be valid against creditors, though it contain no covenant to indemnify.

<sup>t</sup> 2 Sim. & Stu. 372.

<sup>u</sup> *Ross v. Willoughby*, 10 Price, 2.

<sup>v</sup> *Seeling v. Crawley*, 2 Vern.

386. *Angier v. Angier*, Prec. Chan. 496.

<sup>w</sup> 8 T. Rep. 521.

out of the produce to pay the debts of the grantor, the surplus to be held for the benefit of his wife as a separate maintenance ; and the Court of King's Bench held, that the deed was neither fraudulent nor voluntary, but founded on a valuable consideration, though no covenant of indemnity were in it. The same principle was decided in *Hobbs v. Hull*,<sup>x</sup> where the creditors of Mr. Hull, the husband, filed a bill to set aside a settlement made by him of part of his real estate upon his wife and children, on the occasion of a separation between him and Mrs. Hull ; and they insisted that it was void, he being indebted at the time of making it. The defence set up by the answers was, (which was fully proved in the cause,) that Mr. Hull had, before the time of the separation, lived in a state of adultery, which the defendants contended gave the wife a right to a divorce and alimony, and that the provision by the settlement was only in lieu of the remedy which would be obtained by such proceeding. The Master of the Rolls said, that if the husband behave so ill as to entitle the wife to obtain a divorce in the spiritual court *à mensâ et thoro*, and to have a proper allowance from him ; and if the wife, instead of strictly prosecuting that right, meets the husband in the threshold, and says she will accept the maintenance proposed by him without litigation, that it was not such a voluntary act as to be fraudulent against creditors, for that it never could be said to be without consideration. And accordingly his Honour dismissed the bill with costs, as to all the parties except the husband, and as to him, without costs.

At all events, the agreement between husband and wife for a separation and a separate maintenance ought to be made through the medium of a trustee, as it seems to be now considered, that if the contract for separation and separate maintenance be between husband and wife only, without the intervention of any trustee, she cannot come into a court of equity for the execution of it against her husband. Indeed,

<sup>x</sup> 1 Cox's Rep. 445.

in *Guth v. Guth*,<sup>y</sup> Lord Alvanley decreed a specific performance of such agreement, although there was no trustee on the part of the wife ; but that case has been so far shaken by Lord Rosslyn, in *Legard v. Johnson*,<sup>z</sup> where, upon a contract between husband and wife only for a separate maintenance, his Lordship said that it could not be enforced against the husband at her suit. He said that the common law would not entertain a suit upon contract by a wife against her husband. That such a contract is incapable at law of producing any action. That the ecclesiastical court, according to the jurisdiction of this country, has exclusive cognizance of the rights and duties arising from the state of marriage. That he was therefore completely at a loss to discover an equity to control the common law, and to admit a suit between husband and wife upon a personal contract, and supersede the exclusive jurisdiction of the ecclesiastical court, by entering into the consideration of it. His Lordship then took a general view of all the cases upon the subject, and added, that, on the abstract question, he had met with no case, except that of *Guth v. Guth*,<sup>a</sup> to entitle the Court to hold such a jurisdiction ; that his opinion inclined against it ; but that he did not find it necessary to found his decree upon an opinion directly adverse to that case. Lord Eldon has approved of this reasoning, in *St. John v. St. John* ;<sup>b</sup> so that *Guth v. Guth* may be now considered as no longer law.

Contract between husband and wife only, without a trustee, cannot be enforced in equity.

But though the Court will not interfere at the instance of the wife alone against the husband, yet if a trustee have been appointed, and if either he decline to act, or abuse his trust, she will be placed in the same situation in which she would have been, if the trustee had done his duty. In *Cooke v. Wiggins*,<sup>c</sup> the husband had executed a bond to a trustee to pay 30*l.* *per annum* to his wife during a separation, which had been agreed on between them. The annuity being in arrear, and the trustee refusing to put the

If trustee in deed of separation abuse his trust, Court will relieve.

y 3 Br. C. C. 614.  
z 3 Ves. 352.  
a 3 Br. C. C. 614.

b 11 Ves. 526.  
c 10 Ves. 191.

bond in force without an indemnity, the wife filed a bill to have the arrears paid, and the future payments secured, and a fund appropriated for the purpose. And his Honour, Sir William Grant, directed the arrears to be discharged, and the growing payments, with liberty to apply with costs to the *prochein ami*, to be paid by the husband, and when received, the costs of the trustee to be paid over to him. But as to appropriating a fund for the payment of the annuity, his Honour refused that, saying, it could not be contended that a man, by granting an annuity, engages to bring into Court immediately a sum sufficient to answer it. That the very principle of granting an annuity is, that a man may be able to pay by degrees what he has no means of paying at once. So in *Seagrave v Seagrave*,<sup>d</sup> where the husband, upon an agreement between him and his wife for a separation, executed a bond to a trustee for the payment of a weekly sum. The trustee, with the consent of the husband, burned the bond, because the wife had gone to live with another man. The bill was filed by the wife, by her next friend, for an account of the arrears of the weekly payment, that the husband might be decreed to pay them, and in default by him, that the trustee might pay them. His Honour decreed, upon the admission in the answer that the bond had been burned, that the plaintiff should be at liberty to bring an action on it at law in the name of the trustee. He said that he could not hold that, as a separate maintenance is the subject, the trustee contracts no kind of duty towards the *cestui que* trust, but may arbitrarily determine, whether the instrument shall or shall not be enforced, or whether it shall be destroyed. The wife has precisely the same right that any other *cestui que* trust has in any case to call upon the trustee to act ; and the same right to apply to the Court for such relief, as the loss or destruction of the instrument may make necessary.

Adultery  
of the wife  
subsequent

But this case is important in another point of view, as it decides that the adultery of the wife, subsequent to the



agreement for the separate maintenance, does not preclude her from any relief in a court of equity, to which she would be otherwise entitled. Evidence was given in the cause, that Mrs. Seagrave had had an illicit intercourse with another person, which the defendants relied on as a bar to the interference of the Court. But his Honour said, "At common law a jointure is not forfeited by adultery. The forfeiture was introduced by the statute of Westminster 2.<sup>o</sup> But, it is said, this Court will never interfere in favour of a woman who has committed adultery, to enforce any right against her husband: that is not so. This Court does interfere for the purpose of enforcing the performance of marriage articles, though the husband may have proved that his wife is living separate from him in a state of adultery."<sup>f</sup> So, in a court of law, evidence is not admissible of the adultery of the wife upon an action by her trustee against the husband, on his agreement for a separate maintenance, even though such adultery be pleaded in bar. It was so ruled in *Field v. Serres*,<sup>g</sup> upon an application by the defendant for liberty to withdraw his plea of the general issue, and to plead the adultery of his wife, the Court saying, it was perfectly clear, that if the plea was pleaded, it would not afford a defence to the action. However, Mr. Justice Burrough seemed to think, though adultery could not be given in evidence in bar of such an action, yet, if it were *pleaded*, it might.<sup>h</sup> This was, however, an opinion given at Nisi Prius; but it was shortly afterwards ruled on demurrer by the Court of King's Bench, that the adultery of the wife was no bar to an action against the husband for a separate maintenance, which he had covenanted with a trustee to pay to his wife.<sup>i</sup>

to deed of separation, no bar to relief as to the separate maintenance.

As to the covenant on the part of the husband to permit his wife to live apart from him, and not institute a suit

Quære. Is husband bound by

<sup>e</sup> Stat. 13 Ed. 1. c. 34.

<sup>f</sup> *Sidney v. Sidney*, 3 P. Wms. 269. *Blount v. Winter*, 3 P. Wms. 276.

<sup>g</sup> *Field v. Serres*, 1 New Rep. 121.

<sup>h</sup> *Scholey v. Goodman*, 1 Car. 36.

<sup>i</sup> *Jee v. Thurlow*, 4 Dow. & Ry. 11. 2 B. & C. 547.

covenant  
to permit  
his wife to  
live apart  
from him?

against her in the ecclesiastical court, for restitution of conjugal rights, which is a usual part of the contract for separation and separate maintenance, this difficulty arises upon it, namely, if he should break this covenant, and sue for and obtain a sentence for restitution of conjugal rights in the ecclesiastical court, can a court of equity so far interfere as to restrain him by injunction from enforcing the sentence; and if equity will not interfere, is the covenant binding? In *Guth v. Guth*,<sup>j</sup> a case of *Booth v. Booth* was stated to have come before Lord Hardwicke upon a motion for an injunction to restrain proceedings of this description by the husband in the spiritual court, but that it was unknown what his Lordship had done upon it. However, in *Fletcher v. Fletcher*,<sup>k</sup> where the husband had instituted a suit for restitution of conjugal rights, after he had executed articles for a separation, Mr. Justice Buller, who sat for the Chancellor, refused to interfere by injunction. And in *Westmeath v. Westmeath*,<sup>l</sup> Lord Eldon expressed some doubt whether the covenant not to sue for a restitution of conjugal rights, was binding, his Lordship saying, that if he should send the case then before him to a court of law, that should be one of the questions, none of the cases touching it, either in decision or principle.

j 3 Br. C. C. 620.  
k 3 Cox's C. C. 99.

l 1 Jacob, 136.

## CHAP. IV.

OF THE VALIDITY OF AGREEMENTS BETWEEN HUSBAND  
AND WIFE FOR SEPARATION AND SEPARATE MAINTENANCE,  
AND OF THE ENFORCEMENT OF THEM UPON AN  
INTENDED IMMEDIATE SEPARATION.

It has rarely occurred of late years that a court of law or of equity has been called on to enforce the performance of a contract between husband and wife for a separate maintenance, founded on an existing or an intended separation, without exciting much doubt and discussion as to the authority of the tribunal to entertain such a subject. The objections made to the exercise of this jurisdiction are twofold : First, because these agreements are contrary to the policy of the law of marriage. Secondly, because the enforcement of them interferes with the jurisdiction of the ecclesiastical court. In support of the first ground of objection, it is said, that the policy of the law of marriage is, that the contract should be indissoluble, even by the sentence of the law ; that the legislature only can dissolve it ; and that the principle of such indissolubility is, that people should understand, that they should not enter into such fluctuating contracts, and that, knowing such to be the law, they might feel it to be their mutual interest to practise mutual forbearance, and to make allowance for the difference of habits and of feelings. That the enforcing of such agreements is in direct opposition to the policy of that law. That it encourages separation between husband and wife, by affording a facility of entering into that state ; and that it tends to perpetuate that separation, when it has taken place, by supplying to the wife the means of separate subsistence. As to the second objection, namely, that these

Jurisdiction of equity to enforce performance of agreement for separate maintenance between husband and wife.

contracts interfere with the jurisdiction of the ecclesiastical court, it is said, that "in that court there cannot be a separation *à mensa et thoro*, except *propter scævitiā aut adulterium*; and, therefore, that it might happen, that when equity had decreed upon the agreement that husband and wife should live apart, the ecclesiastical court might sentence them to live together."

Equity never decrees a separation between husband and wife, nor that they shall cohabit.

Equity decrees the performance of a contract by husband, to pay a separate maintenance to his wife.

It is not to be understood, as this second ground of objection would imply, that a court of equity has ever assumed to itself the power of decreeing a separation between husband and wife. This court never interferes for the purpose of bringing these parties together, when they have separated; nor will it force them to live apart when they cohabit. But if husband and wife agree to separate, and do separate accordingly, and if he have agreed to pay to her an allowance during such separation, equity will exact a due performance of the latter part of the contract; namely, the payment of the allowance so long as the separation continues, although, if the bill prayed a decree of separation, it would be so far dismissed, on the ground of the illegality of this part of the agreement. And, however strange it may appear, as Sir William Grant observed in the case of *Worrall v. Jacob*,<sup>b</sup> "that the agreement for separate maintenance, which is merely auxiliary, should be enforced, whilst the principal agreement, viz. for separation, is held to be contrary to the spirit and policy of the law, yet the decisions on the subject seem too numerous and uniform to be easily shaken." Indeed, whatever strength the above objections may contain, it is conceived to be quite sufficient for the purposes of this work, to show that courts of equity have, in numerous instances, executed agreements for a separate maintenance, though springing from agreements for separation between husband and wife, and that courts of law have deemed such contracts to be valid engagements, on which actions might be sustained.

<sup>a</sup> See Lord Eldon's judgment in *St. John v. St. John*, 11 Ves. 526.

<sup>b</sup> 3 Mer. 268.

One of our earliest Chancery reporters furnishes a proof that agreements between husband and wife for separation and a separate maintenance are by no means of modern origin ; for Tothill mentions a case of *Gorges v. Chancy*,<sup>c</sup> in which it appeared that husband and wife had separated by agreement, and it was agreed that the wife should have 150*l. per annum*, separate maintenance. But the first instance reported of a bill filed by the wife for a separate maintenance, which had been agreed by her husband to be paid to her, is in the case of *Raynes v. Lewis*.<sup>d</sup> It is thus reported in Nelson : “The bill was brought by a *feme covert* against her husband, to be relieved concerning a separate maintenance agreed to be paid to her by her husband. The defendant demurred, for that she sued without her husband ; but for the reason aforesaid the demurrer was overruled.” We are left to guess what the reason aforesaid was, but it is fully explained in another report of the case ;<sup>e</sup> for there, after stating the demurrer and the cause of it, the case proceeds : “But she being to be relieved touching a separate maintenance agreed to by her husband, the Court overruled the demurrer, declaring that the *feme* might sue without her husband.” The next case in order of time is *Turner v. Boteler*,<sup>f</sup> where, upon some differences arising between the defendant, Sir Oliver Boteler, and his Lady, it was agreed that she should have a separate maintenance of 300*l. per annum*, out of certain premises, which agreement was confirmed by deed containing a demise of these premises to the plaintiffs in trust, out of the rents and profits to pay this annuity to Lady Boteler. The bill was filed by the trustees against Sir Oliver, and the tenants of the trust premises, praying a discovery of the terms and rents at which they held these premises, that the plaintiffs might be the better enabled to perform their trust ; and the rather because they had refused to pay the rents, and to attorn. And other differences arising between Sir Oliver

<sup>c</sup> Tothill, 97. 1 Rep. Chan. 125. Stated also in 1 Chan. Cas. 118.

<sup>d</sup> Nelson, 88. 1 Chan. Cas. 25.

<sup>e</sup> 1 Chan. Cas. 25.

<sup>f</sup> Finch's C. C. 73.

Decree for  
payment  
of separate  
main-  
tenance.

and his lady, it was consented that a decree of this Court should pass ; and accordingly Lord Keeper Nottingham decreed, that Sir Oliver should pay to his Lady, or to her use, all the arrears of the 300*l. per annum*, and should continue the payment thereof according to the deed. That, for the better security of the payments, he should hand over the counterparts of the tenants' leases, and that he should not disturb the said Lady Anne in her person, or meddle with any goods she should acquire. *Fitzer v. Fitzer* is another instance in which the Court of Chancery decreed the payment of a separate maintenance, which the husband had agreed by deed to pay to his wife during their separation. In this case, the husband had agreed with a trustee for his wife, that they should live separate, and by the deed of separation he covenanted to allow her a separate allowance for the support of herself and her daughter. And this bill was filed by the wife and daughter against the husband, who had become insolvent, and against his assignee, under the Insolvent Debtor's Act, to have the trusts of the deed performed. The principal question argued in the case was, whether this conveyance from the husband to his wife was not fraudulent as against his creditors ? And Lord Hardwicke held that it was, no valuable consideration moving from the wife ; but no doubt was raised as to the power of the Court to decree a separate maintenance to a wife, upon an agreement between her and her husband. And accordingly his Lordship decreed, that the trusts of the deed should be performed as against the husband. *Hobbs v. Hull*<sup>th</sup> is a case of the same description ; for there, a separation having taken place between Mr. and Mrs. Hull, he settled part of his real estates, to the amount of 300*l. per annum*, for the maintenance of her and her children ; and the creditors of Mr. Hull insisting that the settlement was fraudulent and void as against them, filed a bill against all the parties to it to have it set aside. But the Master of the Rolls held, that under the particular

Decree for  
payment  
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circumstances of the case, the deed was not void, and his Honour, so far from thinking that an agreement between husband and wife for a separate maintenance was not to be enforced, said, "Husband and wife may certainly, in particular situations, treat together effectually, if they treat on fair and reasonable terms." In *Fletcher v. Fletcher*,<sup>i</sup> also, Mr. Justice Buller said, that "the general jurisdiction of this Court to enforce articles of separation is too well established to admit of any doubt." And in *Westmeath v. Westmeath*,<sup>j</sup> Lord Eldon refused an injunction to restrain Lady Westmeath from proceeding at law for the recovery of an annuity, which had been secured to her by a deed of separation, although it did not contain a covenant by the trustees to indemnify the husband from her debts. And in the subsequent case of *Ross v. Willoughby*,<sup>k</sup> where a general demurrer was put in to a bill, praying an account of assets, and payment of the arrears of an annuity secured by covenant in a deed of separation executed between a wife and her former husband, and the question as to the validity of such contracts was very fully discussed, the demurrer was overruled, Chief Baron Richards saying, "If we allowed the demurrer, we should overrule very solemn decisions. The question is certainly one of which great doubt has been entertained, and opinions have been expressed by judges, disapproving of the doctrine now settled and established, on which suits founded on articles of separation have been maintained. I am of opinion, with Lords Eldon and Loughborough, that it would have been well if such contracts had not been held to be binding for any purpose; but the question is, not what the law ought to be, but what it is; and the opinions of judges, however great and learned, are not to be put in competition with decisions determining the point, and settling the law." And, in a very late case, *Elworthy v. Bird*,<sup>l</sup> where the bill prayed a specific performance of an agreement for a separation, and an account

Decree for payment of separate maintenance.

Injunction to restrain wife from proceeding at law for separate maintenance.

Decree for payment of separate maintenance.

i 2 Cox's C. C. 99.  
j 1 Jacob, C. C. 126.

k 10 Price, 2.  
l 2 Sim. & Stu. 372.

Decree for  
payment  
of separate  
main-  
tenance.

and payment to the wife of the arrears of the allowance of 50*l. per annum*, agreed to be paid to her for life, a general demurrer was put in to the bill for want of equity. In support of the demurrer, one of the grounds taken was, that the Court of Chancery will not carry into execution articles of separation between husband and wife; but the Vice Chancellor held, that "inasmuch as these articles contain an engagement on the part of the father, and the brother of the wife, to indemnify the husband from the debts of the wife, in consideration of the husband's stipulation to pay the wife an allowance of 50*l.* a year for her life, there can be no question that this Court will enforce that stipulation against the husband."

The above are the decisions of a court of equity; courts of law also have enforced agreements for the payment of a separate maintenance, and it does not appear that, on their first introduction, they excited any doubts as to their legality.

Action of  
covenant  
for sepa-  
rate main-  
tenance  
supported.

The first case reported on this subject was so far back as the reign of Charles II. This is *Leech v. Beer*,<sup>m</sup> where, in an action of covenant with plaintiff to pay to the defendant's wife, or such as she appoints, 50*l. per annum*, as a separate maintenance, no doubt was suggested of the legality of such a contract, the only point in the case being made on demurrer to the replication; namely, whether a proviso that the wife should live at such a place as Naylor and W. appointed, was a condition precedent or sub-

Action of  
covenant  
for sepa-  
rate main-  
tenance  
supported.

sequent? The next case reported on the subject is that of *Gawden v. Draper*,<sup>n</sup> where a deed of separation had been executed between husband and wife, in which was a covenant for a separate maintenance during separation, on which an action was brought; and although a demurrer was taken to the replication, no question was made as to the validity of such an engagement. In modern times, certainly, the question has been raised, whether a deed for

<sup>m</sup> 3 Keb. 363.

<sup>n</sup> 2 Vent. 217.



separation and a separate maintenance was a valid instrument at law ; and the decisions have been uniformly in their favour. In the case of *Lord Rodney v. Chambers*,<sup>o</sup> where the very point was argued on demurrer, the Court of King's Bench decided, that such contracts were valid ; Lord Ellenborough saying, " The question which has been agitated, appears to have been laid at rest for a long period by repeated decisions, and the uniform practice of the Courts." In *Elworthy v. Bird*,<sup>p</sup> which was an action of assumpsit, founded on an alleged engagement by defendant, to execute a deed of separation from his wife, with a covenant to pay the plaintiffs, her father and brother, a sum of money yearly for her maintenance ; the plaintiff was nonsuited, on the ground of want of evidence to prove the agreement ; but no objection was made on the ground of its illegality. Besides these cases, there are several others, in which courts of law have given relief to the wife against the husband, upon a breach of a covenant that she should live separate from him, by restoring her to liberty, when he has seized her in violation of his agreement :<sup>q</sup> a jurisdiction which could have been exercised only on the supposition that the covenant was legal.

Covenant for separate maintenance during separation, held to be valid at law.

However, notwithstanding all these acknowledgments of the legality of agreements between husband and wife for separation and separate maintenance, the very point has been again made and argued in two late cases. The first is *Scholey v. Goodman*,<sup>r</sup> which was assumpsit upon an agreement between husband and wife, that they should live separate, and that he should pay a certain sum for her maintenance ; the plaintiff, a trustee, undertaking to indemnify the husband against all debts she might contract. There was a verdict for the defendant ; and on a motion for a new trial, the Court called on the counsel showing cause against the rule, to address himself to the point, whether any action was maintainable upon a separation-agreement like the present ? There was another point in the case

<sup>o</sup> 2 East, 283.

<sup>p</sup> 13 Price, 222. 1 M'Lel. 69.

<sup>q</sup> See Chap. VI. of this Book.  
<sup>r</sup> 1 Car. 36. 1 Bing. 349.

Covenant  
for sepa-  
rate main-  
tenance,  
held valid  
at law.

respecting the admissibility of declarations by the wife, and the Court expressed their wish, that these important points should be brought before them in the shape of a special case ; which proposal having been declined on account of the expense, a new trial was granted, their Lordships expressly abstaining from giving any opinion on the questions which had been discussed. A new trial was afterwards had, when Sergeant Vaughan contended that the plaintiff should be nonsuited, because agreements like this were void in law. But Mr. Justice Burrough said, "I am clearly of opinion that this agreement is perfectly legal and good."

Covenant  
for sepa-  
rate main-  
tenance,  
held valid  
at law.

The next case upon this subject is *Jee v. Thurlow*,<sup>\*</sup> where, by indenture, reciting that husband and wife had agreed to separate, he covenanted with the plaintiff to pay him an annuity of 80*l.* for her support ; the plaintiff covenanting to indemnify the defendant against the debts of the wife to be incurred after the separation. The defendant pleaded a decree of divorce from bed and board by the ecclesiastical court, on the ground of the wife's adultery, to which there was a demurrer. The substantial question raised on these pleadings was, whether the indenture was valid in law or not ? which the Court ruled unanimously in the affirmative. Justice Bayley said : "A system of jurisprudence so long acted on, as that which has held deeds of separation, made with the approbation of trustees, and not prospective in their nature, as valid and binding instruments, cannot be overturned upon a vague notion, that it is inconsistent with public policy. This Court, after the numerous authorities which have declared such deeds legal, is not competent even to inquire whether they are so or not. The House of Lords is the proper tribunal for such an inquiry ; and thither the case may be carried for further discussion on that point." This solemn decision of the Court of King's Bench, it is presumed, will put to rest this question on the validity of agreements for separation and separate maintenance.

The above cases in equity, and at law, have been stated, merely with a view to establish the general proposition, that an agreement between husband and wife for separation and a separate maintenance may be supported. There are several other cases equally applicable to the same purpose ; but as some of them have been already stated in a former part of this book, and the remainder will be stated in a subsequent part of it, with a view to illustrate and explain the various incidents belonging to the different species of these agreements, it is not considered necessary to insert them in this place.

Agreements for separate maintenance may be distinguished into several kinds, each depending on the nature and extent of the separation, to which the parties have agreed. They are, first, where the separation has taken place, or is intended to be immediate ; secondly, where the separation is intended to be future. And these classes may be divided into agreements for separate maintenance ; first, where the separation is intended to be temporary ; secondly, where it is intended to be permanent. This latter division will be found to be important in this point of view, that wherever the separation is intended to be temporary only, there, if the husband offer to take back his wife, and to maintain her, it puts an end to the agreement, and a court of equity will no longer enforce the payment of the separate allowance to the wife. But where the separation is intended to be permanent, that is, during life, there the offer of the husband to take his wife back does not put an end to the contract, and it will be enforced notwithstanding such offer. If, however, the wife once accept the offer, and return to her husband's house and protection, this conduct on her part amounts to a total extinguishment of any future claim under the articles, which cannot be revived by any subsequent disagreement between the parties. It will be found, however, that whether the agreement be for a temporary, or for a permanent separation, if the husband have covenanted to pay his wife an allowance during such separation, a court of equity will force him to perform his covenant

Agreements for separate maintenance are :

1st. Where separation has taken place, or is intended to be immediate.

2d. Where it is intended to be future.

3d. Where it is intended to be temporary.

4th. Where it is intended to be permanent.

Where separation intended to be temporary, an agreement put an end to by offer of the husband to cohabit with his wife.

Where separation

intended to be permanent, an agreement will be enforced, though husband offer to cohabit with his wife.

If wife cohabit with

husband after an agreement for a permanent separation, the agreement is extinguished.

Decree for separate maintenance refused, where separation temporary, and husband offered to cohabit.

with her, so long as the separation continues, unless when he offers cohabitation in the instance of a temporary separation, at the same time that the separation and its continuance are left entirely to the feelings and the arrangement of the parties themselves, the Court never once using its authority for the purpose of effecting the separation, if it have not taken place; nor of terminating it, if it have commenced.

*Head v. Head*<sup>t</sup> is the first case where the agreement appears distinctly to have been, and was decided to be, for a maintenance during a mere temporary separation. The bill was filed against the defendant, Sir Francis Head, for the arrears and growing payments of an annuity of 400*l.*, pursuant to an agreement between him and the plaintiff for that purpose, and to establish the agreement for a separate maintenance. The agreement was with the plaintiff's father, to pay her this annuity so long as plaintiff and defendant should continue to live separate. The bill prayed that the plaintiff might be decreed the separate maintenance, and the arrears of it, and that she might be at liberty to live separate from her husband, the defendant. Sir Francis offered by his answer to take back his wife, and to cohabit with her. Lord Hardwicke said, that "the agreement between Sir Francis and his lady was only for the payment of a maintenance during an occasional absence; that nothing appeared to show that the husband had rendered himself incapable of demanding the return of his wife; and that, as he had offered to take her back, and she appeared unreasonably averse from returning, he could not make a decree for the continuance of the alimony." His Lordship then decreed the arrears to be paid to Lady Head; but that Sir Francis, having offered to receive her again, he should receive and treat her as his wife, if she would return; but in case she did not return in a month, the maintenance should cease for the future. And, on the other hand, that if she

returned home, and the defendant refused to receive, maintain, and treat her as his wife, the separate maintenance should then continue.

But although an offer by the husband to cohabit with his wife disentitles her to any further payment of a separate allowance, where the separation was temporary only ; yet if a third person have covenanted with the husband to pay a separate maintenance to the wife, who has parted from her husband with their mutual consent, the offer of that person to take her home and to support her, does not bind her, though she should refuse it, and though the separation should be temporary ; for there is no obligation upon her to live with that third person. This was ruled in *Dutton v. Dutton*,<sup>u</sup> where Dutton being tenant for life, remainder to his first and every other son successively in tail male, and having had 10,000*l.* with his wife, agreed to convey all his estate to his eldest son, the son covenanting to pay all his father's debts, and to allow him 500*l.* *per annum* for his life ; and also to indemnify his father from all debts, charges, and expenses, for the maintenance of the father's wife, she living then separate from him by consent. Lord Chancellor Cowper said, that the son by this covenant had taken on himself the charge of maintaining his mother, and to this purpose stands in the place of her husband, who is bound to give his wife an allowance if he separates from her voluntarily ; and that he took the son in this case to be in the nature of a trustee for the wife, so far as a reasonable allowance for her maintenance ; and though the son offers to take her to his house, he did not think she was bound to accept that offer ; for though he stands in the place of the husband as to her maintenance, and a husband is not bound to allow any thing to his wife for maintenance, if he offers to take her home, yet in this case there lies no such obligation upon the wife to live with the son ; and though she refuses, she ought to have a reasonable allowance : and accordingly his Lordship ordered her to be allowed 200*l.* *per*

Offer of a third person, who has agreed to pay separate maintenance to wife during separation, to take her to his house, does not extinguish the agreement.

If there be a decree for payment of separate maintenance on an agreement for temporary separation, the offer of the husband to cohabit will suspend the payment.

*annum.* So in *Whorewood v. Whorewood*,<sup>v</sup> the husband filed a bill to set aside a decree that had been pronounced against him for 300*l.* *per annum* alimony, during the separation of himself and Mrs. Whorewood, offering by his bill to be reconciled to his wife, and to cohabit with her; and the Lord Keeper Finch said: "I shall not continue the alimony to the wife if she will not cohabit, nor decree the wife to cohabit, but shall not discharge the alimony or sentence, but keep it in suspense; but the wife shall return to her husband, who shall maintain and use her as a gentleman and a good husband ought to do; wherein, if he fails, I will hear the wife's complaint with favour, and lay on the decree again as cause shall be, but now suspend it, saving to her the arrears; but she shall immediately return, and if not, she shall have no benefit of the alimony till she do so, but take her remedy in the court ecclesiastical." The decree for alimony mentioned above, which the bill sought to set aside, was pronounced during the protectorate of Oliver Cromwell, when the powers of the ecclesiastical court were suspended, and the Lords Commissioners of the Great Seal were invested with jurisdiction to determine cases of alimony; and, therefore, it becomes difficult to ascertain what branch of their authority the Lords Commissioners were exercising when they decreed this separate allowance; whether, as Judges of the spiritual court, they had given the wife alimony as incident to a sentence of separation, or, as a court of equity, they had decreed a separate maintenance upon an agreement for separation between the parties; and on this account it would be well to attend to the recommendation of Mr. Justice Buller, with respect to this case, viz. not to cite it on any discussion relative to the authority of the Court of Chancery on the subject of separation and separate maintenance.<sup>w</sup> However, the decision of Lord Keeper Finch, (which was after the Restoration,) as to setting aside that decree, establishes this position, that if

<sup>v</sup> Chan. Cas. 250. 1 Chan. Rep. 223. Finch's C. C. 153.

<sup>w</sup> Fletcher v. Fletcher, 2 Cox's Rep. 102.

there be a decree upon an agreement between husband and wife for separate maintenance, so long as they shall live apart, the offer of the husband, by his bill, to cohabit with her, suspends the payment of that allowance, whether the wife consents or not.

These cases prove, that if the agreement between husband and wife be for a mere temporary separation, his offer of cohabitation is a bar to her claim of the separate maintenance for the future. But if the agreement be for a permanent separation during the joint lives of husband and wife, that is, until both of them shall agree to come together again, and that he shall pay her a separate maintenance so long as this separation continues, in such a case no offer on his part to cohabit will prevent her claim to her separate maintenance from being enforced by the Court. In *Seeling v. Crawley*,<sup>x</sup> the husband offered to take his wife back, and yet the Court decreed him to pay a sum of money, which he had agreed to pay his wife on their separation. It does not appear whether the agreement was for a permanent separation or not, but the nature of the transaction renders it most probable that the separation was intended to be permanent. The case was, that upon a quarrel between the defendant and his wife, he gave a note to her father (the plaintiff Seeling) to pay him, on demand, 160*l.*, the portion he had received with his wife from the plaintiff, he indemnifying the defendant against the debts of the wife, and against all demands for her maintenance. The wife and her child went to live with the plaintiff, her father, and were maintained by him. The bill was filed by the father and the daughter, praying that he should pay over the 160*l.* according to his agreement, or else that he should settle 16*l. per annum*, and secure certain goods that were part of her portion, in pursuance of articles before marriage, and also make a competent provision for her and her child, and pay the father what had been expended on their maintenance since they went to him. The defendant now offered

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to take his wife home, and to maintain her and her child, and to allow the plaintiff for the time past; but the decree ordered, "That the said defendant do pay the 160*l.* to the said plaintiff, Seeling, (the father,) with interest from the filing of the bill; and upon payment of the same, the plaintiff, the father, is at his charge to give security, to be approved by the Master, to keep the plaintiff Elizabeth, and her child, and to indemnify the defendant, the husband, against any charge that may happen to him by his wife and child." *Angier v. Angier* was nearly of the same nature, and was decided a few years afterwards by Lord Chancellor Somers. The bill was filed by the wife, by her next friend, against the defendant, her husband, for a special execution of articles, whereby the defendant was to allow her 52*l.* *per annum* separate maintenance. It was proved in the cause, that the husband behaved very cruelly towards his wife, by beating her several times, and denying her necessaries; and that the wife, on her part, was of a most perverse, morose, and malicious temper. That she libelled her husband in the spiritual court for separation, and for alimony; and that while that suit was depending, the defendant entered into the articles in question with one Abel, in behalf of the plaintiff, whereby the defendant agreed to allow his wife 52*l.* *per annum* separate maintenance, and to permit her to live where she thought fit, without any molestation or disturbance from him; but that the defendant, being desirous to have his wife home again, and to come to a reconciliation with her, had withdrawn, for some time, the payment of this allowance, which was to be twenty shillings per week. And the prayer of the bill was to have the arrears from the time past, and the growing rents and payments during the time of their separation. For the defendant it was argued, that the plaintiff was not entitled to the assistance of this Court for carrying these articles into execution; that such a decree would amount to a decree for separation, which was properly confined to the eccle-

Offer of the husband to cohabit, does not extinguish agreement for sepa-



siastical court; that alimony continued no longer than till husband and wife became reconciled, and consented to cohabit; but if these articles were decreed to be executed, no reconciliation could afterwards set them aside; that the wife was not bound, the articles being signed only by Abel, her trustee, and not by her; and that it was unreasonable that the husband should be bound and the wife free. On the part of the wife, it was urged, that the articles ought to be carried into execution; that they were intended to supply the sentence of the ecclesiastical court, and to prevent the charge and trouble of a solemn litigation there; that the husband, by entering into them, had pronounced sentence on himself; and that though this Court could not decree alimony, yet that it might decree execution of articles according to the parties' own agreement. The Lord Chancellor was of this opinion, and said, that to decree an execution of these articles was not to invade the jurisdiction of the spiritual court; that the intent was to save the expense of a sentence in that Court. That if these articles could not be decreed here, they would be of no force any where, not at common law, because there the wife could not sue, nor in the spiritual court, as it had no power to decree performance of articles. Besides, that this was not a decree of alimony or of separation; for that the parties might, whenever they thought fit, come together again, and then the articles would be no longer binding. This case does not express very clearly whether the agreement was for a temporary or a permanent separation; but, as the case of *Whorewood v. Whorewood*<sup>z</sup> was never once cited by the counsel for the defendant, and would have been a case in point, if the separation in *Angier v. Angier* had been temporary, the presumption is that it was permanent. In *Guth v. Guth*,<sup>a</sup> Lord Alvanley decided, that where the agreement was for a permanent separation, that is, for life, the payment of the separate maintenance must be enforced, though the husband should offer to be

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<sup>z</sup> 1 Chan. Cas. 250. 1 Chan. Rep. 223. Finch's C. C. 153.      <sup>a</sup> 3 Br. C. C. 614.

the separate maintenance will be enforced, though husband offer to cohabit.

reconciled and to cohabit. The bill in this case was filed by the wife by her next friend against her husband, praying that an account might be taken of what was due to her in respect of the arrears of an annuity of 100*l.*, agreed to be paid to her by her husband, in pursuance of a deed poll of separation, and that he might pay the same to her use, as well as the growing payments thereof, as they should from time to time become due. The facts were, that the husband and wife, not being able to live together, in consequence of unhappy differences that had arisen between them, had agreed to live apart from each other ; and accordingly, on the 26th October, 1786, a deed poll of that date was executed by the defendant, stating " that they had mutually agreed and consented to live separate and apart from each other from that day ; and that the plaintiff had consented to go immediately into foreign parts beyond the seas, and had promised not to molest the defendant in any manner whatsoever, and not to return into these kingdoms without his consent in writing first had and obtained, and signed by two witnesses ; and that the defendant agreed to allow to and to pay the plaintiff or her assigns 100*l. per annum*, for the full maintenance of herself and one of her children, named Henry, during her natural life, and as long as they should so keep separate and apart from each other, by equal quarterly payments from that day ; and in case she should contract any debts without the privity and consent of the defendant, and which he should be compelled to pay, that then the agreement should be void." The wife went abroad in compliance with this agreement, and the husband continued for some years to pay her the allowance ; but latterly he had remitted her only 40*l. per annum*, alleging that he had become insolvent, and was unable to pay more ; however, offering to relinquish the agreement, and to take home the wife and her child, and to maintain them in the best manner that he was able. This case was much debated at the bar, and it appears from his Honour's judgment that two questions were raised ; first, Where the agreement

was for a temporary or a perpetual separation? and, secondly, whether equity had a jurisdiction to enforce such a contract? As to the first question, his Honour said, that if it did not amount to an engagement, upon the part of the husband, to permit the plaintiff to live separate, till they mutually agree to cohabit together, the bill could not be sustained: because he, by his answer, has agreed to do so. But his Honour added, that the true construction of the deed was a total separation, until *both* should agree to cohabit. That the recital in the deed takes no notice of any future cohabitation, for the words purport to be a *mutual* agreement to live separate from this day, and that he could not annex any other meaning to them, than that of a perpetual separation from each other, unless both parties should *jointly* wish to live together again. As to the second question, namely, whether to enforce such a contract would be an infringement upon the jurisdiction of the spiritual court, his Honour said, that that Court (the spiritual) could only judge by circumstances, how far it is warranted to pronounce a compulsory sentence against the husband or wife, but that with respect to the contract itself for a separation, it cannot have any right to pronounce sentence upon the agreement itself, or to take into consideration the circumstances on which it may be founded. That in such cases, where parties have been unhappy, and it has been found expedient to enter into such a deed of separation, it was neither necessary nor fit that a wife should proclaim to the public every circumstance that may have occasioned it, neither was it necessary for this Court to know every particular so as to enforce an execution of it. His Honour added, that he was bound by the cases to enforce this agreement. It was referred to the Master to take an account of what was due for the arrears, and ordered that the same should be paid, together with the growing payments, to the plaintiff, or to such person as she should appoint, and that the defendant should pay the costs.

But though the offer of the husband to maintain and cohabit with his wife will be no bar to a suit by her for the

If wife cohabit with her hus-

band after the execution of agreement for separation and separate maintenance, it will not be enforced.

specific execution of his agreement to pay her a separate maintenance, where the separation has been agreed to be for life, yet if the wife voluntarily cohabits with her husband after the execution of the articles, this act puts an end to the contract, and her bill for the performance of them will be dismissed. This was so decided in *Fletcher v. Fletcher*.<sup>b</sup> The original bill in this case was by Mrs. Fletcher, by her next friend, against her husband, praying the specific performance of an agreement entered into by the defendant with the plaintiff for their living separate from each other, and for an allowance or separate maintenance, to be paid by the defendant for the benefit of the plaintiff during such separation. It appeared, that on some disagreement between Mr. and Mrs. Fletcher, it was proposed that they should separate; and accordingly articles were drawn, in which it was agreed, "That during the separation that was intended to take place between plaintiff and defendant, he would pay her or her certain attorney, or order, the sum of 110*l.* *per annum*, at four quarterly payments," &c. &c. There was also a covenant, "That they should execute such deed or instrument as should be thought necessary by the attorney of Mrs. Fletcher's brother, for the security and full execution of the premises." A deed was afterwards prepared for the purpose of carrying this agreement into execution, and was tendered to the defendant; but he refused to execute it, on which the original bill was filed. Mr. Fletcher then instituted a suit in the ecclesiastical court for restitution of conjugal rights, in which a sentence was pronounced in his favour. The plaintiff then amended her original bill, stating this fact, and insisting that the defendant ought to be restrained from such a proceeding under the circumstances of the case; but it formed no part of the prayer of the bill. Mr. Fletcher filed a cross bill, in which he prayed that the articles might be delivered up; and by his answer to the original bill, and by his cross bill, he insisted that the agreement was for a temporary separa-

<sup>b</sup> 2 Cox's Rep. 99.

tion only, until his affairs should be arranged ; that whatever might be the effect of the agreement, yet it was altogether waived by Mrs. Fletcher and himself agreeing, subsequently to the memorandum, to live together ; and that he had been and still was desirous of their living together. This case was heard before Mr Justice Buller, sitting for the Chancellor ; and though his Lordship was of opinion that the agreement was for a separation for life, yet as the parties had been reconciled, and had cohabited with perfect harmony for seventeen days after the execution of the articles, he dismissed the original bill, and decreed the articles to be delivered up, considering that the reconciliation completely did away the agreement. So in *Bateman v. Lady Ross*,<sup>c</sup> which was heard before the House of Lords, on an appeal from the Court of Chancery in Ireland, it appeared that Lady Ross had lived in the same house with her husband after the separation ; and Lords Eldon and Redesdale held, that her Ladyship having gone there for the purpose of protecting her property, and not from any spirit of reconciliation, it was no bar to her claim to her separate maintenance ; and Lord Eldon said, “ notwithstanding what might be found in some of the reports, he held the general doctrine to be clear, that a reconciliation after a separation entirely did away with the effects of it.” Justice Burrough also held, that an agreement for a separation and a separate maintenance was put an end to by the husband and wife afterwards sleeping together ;<sup>d</sup> so that these cases prove, that where no offer has been made by the husband to cohabit with his wife, after an agreement for separation and a separate maintenance, he will be obliged to perform his agreement for the payment of the maintenance, whether the separation was intended to be temporary or permanent ; and that where the agreement is for a temporary separation, the offer of the husband to cohabit with his wife puts an end to the article for a separate maintenance, and that the Court will not enforce them ; and that where

Where wife goes to the house of her husband after separation, and lives there for the protection of her property, and not for reconciliation, she will not be barred.

<sup>c</sup> 1 Dow. P. C. 235.

<sup>d</sup> Scholey v. Goodman, 1 Car. 39.

the separation is intended to be for life, the agreement for a separate maintenance will be specifically performed, notwithstanding such an offer ; but that though the agreement should be for a permanent separation, yet if the husband and wife afterwards cohabit, the whole agreement becomes ineffectual, and cannot be revived.

Although it is evident that to decree a separate maintenance upon an agreement, where both husband and wife concur in the wish of living separate, is not to establish a separation between them, because while they both refuse to cohabit, neither the Court of Chancery nor the ecclesiastical court can force them to live together ; yet where the court of equity enforces the payment of the maintenance against the husband, when he is willing and offers to cohabit, it must be admitted that such a decree, under such circumstances, amounts to a sentence of separation. There is indeed the authority of Lord Hardwicke<sup>e</sup> and of Mr. Justice Buller<sup>f</sup> for saying that equity has such a jurisdiction upon the agreement of husband and wife, and Lord Alvanley has exercised that power ;<sup>g</sup> however, Lord Eldon has expressed a different opinion,<sup>h</sup> refusing at the same time to act in opposition to these decisions. The jurisdiction of the ecclesiastical court upon the subject of separation, certainly throws a serious difficulty in the way of a similar power in a court of equity ; for Mr. Justice Buller admits, that if the husband, after an agreement with his wife for a perpetual separation, sues for and obtains a sentence for restitution of conjugal rights, equity will not enjoin him from such a proceeding ; and his Lordship added, that he did not know of any instance of this Court interfering by way of injunction to prevent a proceeding of this nature in the ecclesiastical court, and that he did not feel himself prepared to make such an instance ;<sup>i</sup> and Lord Eldon shows, that if the wife, under similar circumstances,

<sup>e</sup> Head v. Head, 3 Atk. 547.

<sup>h</sup> St. John v. St. John, 11 Ves.

<sup>f</sup> Fletcher v. Fletcher, 2 Cox's 526.

Rep. 99.

<sup>i</sup> Fletcher v. Fletcher, 2 Cox's

<sup>g</sup> Guth v. Guth, 3 Br. C. C. 614.

Rep. 107.

sues for restitution of conjugal rights, the court of equity cannot restrain her, because it is impossible to say that the wife is bound in any degree by a deed of this sort: j how then can the court of equity be said to have a jurisdiction to do that which the ecclesiastical court may undo the moment after it has been done? However, there is no instance where the Court of Chancery has decreed a separation in express terms, upon the prayer of a bill framed for that purpose alone: it always has produced that effect by decreeing the separate maintenance which the husband has agreed to pay during the separation. Indeed, in *Wilkes v. Wilkes*,<sup>k</sup> Sir Thomas Clarke dismissed the bill, so far as it sought to establish an agreement for a separation, though the husband and wife both consented in court, at the same time that he decreed upon the same consent, that all the other parts of the bill might be carried into execution.

- All the above cases are instances of proceedings at the suit of the wife for a separate maintenance, which her husband had agreed to pay her. There are also instances where the agreement was by the wife to pay her husband a separate maintenance, in consideration that he would permit her to live apart from him, and where such agreement has been deemed valid. The first case is that of Sir *Cleave More v. Ellis and others*.<sup>l</sup> There it appeared, that Lady More had abandoned her husband, and lived in a state of adultery with several persons; and that, while she was so living apart from her husband, her father devised a large property to trustees for her sole and separate use. After this devise, Sir Cleave met her in a coach, and took possession of her, and on the day following there were articles of agreement executed by Sir Cleave and his Lady; the substance of which was, that, in consideration that Sir Cleave would permit her to live separate from him, she would settle on him for his life 200*l.* *per annum*, and also pay him the sum of 1000*l.* out of her separate estate. There was a bill filed by Lady More for the purpose of

Agreement by wife to pay separate maintenance to husband during separation, valid.

j *St. John v. St. John*, 11 Ves. 533.

k 2 Dick. 791.  
l *Bur.* 205.

Agreement by wife to pay separate allowance to husband so long as he suffers her to live apart from him, valid.

setting aside these articles, and a cross bill was also filled by Sir Cleave to carry them into execution. And an issue was sent from the Court of Exchequer to try whether they had been obtained by duress, but no question was made as to their validity. The next case, *Brighton v. Chapman*,<sup>m</sup> is of much more modern date, and very nearly the same in circumstances. The bill was filed by the husband against the trustees, in articles of separation between him and his wife, for an annuity by those articles covenanted to be paid to him out of the property of the wife, which had been assigned to them. The plaintiff covenanted in the articles not to molest his wife, nor force her to cohabit with him, and the annuity was declared to be payable while he should leave her unmolested. The defence set up by the answer was, that the plaintiff had molested his wife, by which he had forfeited his annuity. And the evidence on this point being contradictory, an issue was directed to try, whether the plaintiff had broken his covenant by molesting his wife, or not. The result of the issue is not mentioned, but it is evident that the Court would not have directed the fact of molestation to be tried, if they considered the articles to be invalid. And these last two cases seem to be liable to every objection which has been made to agreements between husband and wife for separate maintenance, when a separation either has taken place or is intended. The latter differ from all the other instances in this respect, that, in these, the provision moves from the wife to her husband, whereas, in the former, it moves from the husband to his wife. And these examples of compacts are of the very worst description that can be entered into between a husband and his wife, because they are the application, by a married woman, of her own separate estate to the purchase from her husband of an exemption from the duties which marriage has imposed upon her. Indeed, it is scarcely possible to imagine, that a married woman can apply her separate property to a purpose more dan-



gerous to the well-being of society, than in a bargain with her husband for an independence from that state in which the law of coverture has placed her. And, perhaps, Lord Thurlow was actuated by some such feeling in the case of *Durand v. Durand*,<sup>n</sup> when he refused to interfere in an agreement of this kind between husband and wife. There, the wife, by her next friend, was the plaintiff, and the husband, and two trustees, were the defendants. The bill stated, that, after the marriage of Mr. and Mrs. Durand, a sum of 6050*l.* 3 *per cent.* annuities, was transferred by the defendant into the joint names of Mrs. Durand and two other persons, in trust for her separate use; that an agreement had been afterwards entered into between the plaintiff and her husband, that they should live separate; that the 6050*l.* bank annuities should be sold, and that out of the produce 1500*l.* should be paid to the plaintiff, and the residue to her husband; that the trustees, in whose names the money had been transferred jointly with the plaintiff's, had declined to do any act in respect thereof without the indemnity of the Court. The prayer of the bill was, that the trustees might join with the plaintiff in the sale of the annuities; and that, out of the produce of the sale, 1500*l.* might be paid to the plaintiff, and the remainder to her husband, according to the terms of the agreement. The husband admitted the facts as charged by the bill; but his Lordship, fearing that it might have been intended to settle this money upon the issue of the marriage, he referred it to the Master to inquire and report upon what trusts this money had been transferred into the names of the trustees. The Master reported, that the trusts were exactly as the bill had stated. The cause coming on afterwards for further directions, Mrs. Durand attended in court; when the Lord Chancellor told her, that, according to the report of the Master, he found that she was entitled to the entire of 6050*l.* to her own separate use, and asked her whether she did not choose to have what she was entitled to. She

Bill by wife for execution of an agreement with her husband that they should live separate, she paying a sum of money for the separation, dismissed.

answered, that she wished to have 1500*l.*, part of it, and that the rest might be paid to Mr. Durand. His Lordship then asked why she chose to have a part instead of the whole; to which she said, because it had been so agreed between her and Mr. Durand, and that she wished to give the remainder for the sake of living separate. Notwithstanding this, the Lord Chancellor said, he could not find himself justified in interfering in any manner in a business of this sort, where the plaintiff was clearly entitled to have the whole, but acceded to the terms of giving up two thirds for the sake of the separation. And no other terms being agreed to on the part of the defendant, the husband, his Lordship dismissed the plaintiff's bill.

From these authorities it may be inferred, that it is competent at this day to a husband and his wife to enter into an agreement through the medium of trustees, that they shall thenceforth cease to cohabit, and that during that separation he shall pay to her an allowance for her support, the due discharge of which both courts of law and of equity will enforce; and, also, that the wife may covenant to pay a portion of her separate property to her husband, on the terms of his suffering her to live apart from him; but that neither she nor her husband will be assisted by the Court in getting the possession of that property, with a view to carry this agreement into effect, if that agreement bears the appearance of inequality or unfairness.

## CHAP. V.

### OF THE ENFORCEMENT OF AN AGREEMENT BETWEEN HUSBAND AND WIFE FOR A SEPARATE MAINTENANCE, IN CONTEMPLATION OF A FUTURE SEPARATION.

THE cases in the preceding chapter prove, that a contract between husband and wife for a separate maintenance, upon an intended immediate separation, have been considered valid both at law and in equity. It shall be now shown, that an agreement of the same kind, entered into in contemplation of a future separation, is equally sustainable, and will be equally recognised in our courts of justice.

Agreements for separate maintenance, in contemplation of a future separation, enforced.

Agreements to pay a separate maintenance, in the event of a future separation, take place when two persons, either before their marriage, and in contemplation of it, or after their marriage, enter into an engagement, generally by deed, and with a third person, that if they should at any future period disagree, and find it necessary to live separate from each other, that then the husband should pay to the wife a certain allowance for her support, at stipulated periods. It will naturally be supposed (as the fact really is) that the instances of either sort, viz. before or after marriage, and particularly of the former, are not very numerous, for that stipulation must afford a bad omen of future happiness, which guards against the possible occurrence of disagreements between husband and wife, and that too in an engagement originating in the supposed existence of mutual attachment. Indeed, whether such a contract be entered into before or after marriage, it most surely accomplishes the event for which it means to provide, as it gives the wife an interest in disobedience, and renders her more independent

Agreements before marriage for a future separation, and separate maintenance.

by her misconduct, than by the most strict observance of her marriage duty. It is therefore not to be wondered at, that one example only of a compact before marriage of so mischievous a tendency has found its way into our courts of justice ; that was in the case of *Hoare v. Hoare*,<sup>a</sup> where Mrs. Hoare, being entitled to two annuities of 200*l.* each, for her life, intermarried with Bartholomew Hoare, previous to which a deed was executed by her and her intended husband, by which the two annuities were assigned to two trustees, their executors, and in trust that in case any separation should thereafter take effect between husband and wife, by the desire, or at the instance of the wife, then the trustees should permit and suffer her and her assigns to take and receive to her own sole and separate use, one moiety of said 400*l. per annum* during such separation, without the intermeddling of her intended husband, and should permit and suffer him and his assigns to take and receive to his own sole and separate use the other moiety of said annuity ; and in case any separation should take place at the instance, or by the means of the said intended husband, then the said wife and her assigns should have and receive the whole of said annuity to her own sole and separate use, notwithstanding her coverture. In some time after the marriage, Mrs. Hoare filed a bill in the Court of Chancery of Ireland, by her mother and next friend, against her husband and the trustees in the deed of settlement, charging him with many outrageous acts of cruelty towards her, by which she was forced to live separated from him, and praying that he might be restrained by injunction from intermeddling in the receipt of the said annuities, and that the trustees might be restrained from paying any part of the annuity to him ; and that he might be decreed to pay over to her, or permit her to receive, the whole of said annuity ; and that she might be at liberty to give receipts for the same in her own name ; and that the trustees might pay over to the plaintiff the said annuity, or such part

<sup>a</sup> 2 Ridgway's Parl. Cas. 268.

thereof as the Court should direct, pending the cause ; and that a receiver might be appointed. The defendant denied the charges of cruelty, and alleged, on his part, that his conduct had been uniformly tender and affectionate, while she had been groundlessly jealous, violent, and abusive ; and he offered, by his answer, to take her back, and treat her as his wife. On hearing the cause on pleadings and proofs, the Lord Chancellor (Lord Gifford) decreed one moiety of the annuity to the plaintiff, until she and the defendant should cohabit, or until further order of the Court, to commence from the time she ceased to cohabit with the defendant ; and decreed the other moiety to the defendant, and the arrears of the annuity to be equally divided and paid respectively forthwith, with liberty to each party to proceed in the ecclesiastical court, as they should be advised. The plaintiff appealed from this decree to the House of Lords, alleging that the entire annuity should have been decreed to her, as the separation had been caused by her husband's cruelty towards her. It was also contended on her part, that it was competent to an intended husband to abridge or renounce the rights which the law gave him over the person and property of his wife. On the other side it was insisted on, that no court, either of law or equity, is competent to decide on this agreement in the first instance, without a previous sentence of the ecclesiastical court, or an agreement of both parties, in writing, to separate for life ; that the agreement in this case was not only illegal, but immoral ; that, according to the construction put upon it, the agreement was for a divorce, and not for a marriage ; besides that, the agreement being for a provision during separation, the defendant had, by a judicial offer to receive the plaintiff, and treat her as his wife, put an end to such separation. However, the Lords varied the decree, by ordering the entire annuity to be paid to Mrs. Hoare, until such time as she and her husband should cohabit, or until the further order of the Court of Chancery.

This is the only instance to be found in the books, of an agreement before marriage, between the intended husband

and wife for a separate maintenance for her after marriage, in the event of a future separation between them. And if it be once established, that an agreement after marriage for a separate maintenance upon a prospective separation is valid, there seems to be no reason (as Lord Eldon observes in *St. John v. St. John*,<sup>b</sup>) why a similar covenant should not be permitted in a settlement before marriage. Indeed, such a covenant before marriage would have this advantage over one after it, that before marriage the woman has a power of contracting, which she loses altogether when she becomes a wife.

Agreements after marriage for a future separation, and separate maintenance.

The cases which have been reported on the subject of the next class, viz. of agreements after marriage for a prospective separation, are but few. *Gawden v. Draper*<sup>c</sup> is the first; the facts were these: a deed of separation was executed between husband and wife, until they, by writing under their several hands, attested by two witnesses, should give notice to each other that they would again cohabit, in which was a covenant by the husband for a maintenance to the wife during the separation. Covenant was brought by the trustee for a quarter of the maintenance alleged to be due, to which the husband pleaded, that since the execution of the said indenture, and before the commencement of the action, another indenture had been made between the defendant and his wife, by which they had agreed to cohabit, and that it was covenanted by the plaintiff, with the defendant, that, so long as they should cohabit, the allowance might be retained by the defendant. The plaintiff replied, that they did not cohabit *modo et forma*, as alleged in the plea, to which there was a demurrer and judgment for the plaintiff, the whole Court saying, that unless the cohabitation had been according to the first indenture, it was no bar, for that the last deed did not take away the effect of the first; that a latter covenant cannot be pleaded in bar of a former, but the defendant must bring his action upon the last indenture, if he would help himself. This

<sup>b</sup> 11 Ves. 534.

<sup>c</sup> 2 Vent. 217.

case is of value to the present purpose only in this way, that it appears by the plea put in, that an agreement had been entered into between the defendant and his wife, that the allowance for which the action was brought should be retained by the defendant, while they cohabited ; which was, in other words, that in the event of a future separation, the maintenance should be paid ; and no objection on that ground was taken by the counsel or the Court.

The modern authorities having decided that agreements after marriage for a separate maintenance in the event of a future separation are void, if the separation is permitted to depend on the sole will of the wife, it becomes necessary to arrange and consider the cases on this subject under two distinct heads ; first, where the agreement provides that the separation must take place with the approbation of the trustees ; secondly, where the future separation is left to the discretion of the wife alone. *Rodney v. Chambers*<sup>d</sup> belongs to the first class. The form of the action was covenant ; and the declaration stated, that on the 18th of August, 1798, a deed was executed between George Chambers, (the defendant,) of the first part ; the Honourable Jane Chambers, his wife, of the second part ; George Lord Rodney and J. Rodney, of the third part ; and J. Milbank, of the fourth part : that the said Jane was entitled to an annuity of 200*l.*, and to a pension of 100 *per annum*, granted to her by the Irish parliament, as one of the daughters of Lord Rodney ; that divers differences had lately arisen between the defendant and his wife, the said Jane, and that the defendant, in order to put an end to them, and to induce his wife to continue to live with him, had agreed to treat her with all due kindness and regard ; and that in pursuance of said agreement, the said George and Jane Chambers had assigned to the plaintiffs (the trustees) and their executors, &c. the said annuity and pension, and all arrears and future payments thereof, in trust as to the pension, to pay the same to the said Jane, for her sole and

Agreements for separation with the approbation of trustees.

separate use, whether she continued to live with her husband or not ; and as to the annuity of 200*l.*, in trust for the purchase of such wearing apparel and other necessities, as the trustees, the plaintiffs, and John Milbank should deem requisite ; and upon the further trust, that in case any separation should take place between the defendant and the said Jane, *with the approbation of the plaintiffs and of John Milbank*, or the survivors, &c., that the plaintiffs should pay the whole of the said annuity of 200*l.* from time to time, as the same should be received by them, for the benefit of the said Jane, as therein before was directed, touching the said pension of 100*l.* There was also a covenant on the part of the defendant, that if any future differences should arise between him and his said wife, and that she should on that account find it necessary to live separate from him, he would permit her to leave him, and at all times thereafter to live separate from him, when she should think proper. There was a further covenant, that in case the said annuity of 200*l.* so assigned should at any time cease to be payable, that the said defendant would pay an annuity of the same amount to the plaintiffs, subject to the same trusts as the annuity. There was an averment that J. Milbank died ; that a separation afterwards took place ; that the annuity of 200*l.* ceased ; and that three quarters of the annuity had become due since the separation, which were unpaid, and that the defendant refused, &c. &c. There were two pleas put in to this declaration, to which a special cause of demurrer was assigned ; but it is not necessary to state either the pleas or the cause of demurrer, as the counsel for the defendant avowed that they did not intend to support the pleas, but relied solely on the illegality of the contract as set out in the declaration. The plaintiffs, in support of the declaration, alleged, that a covenant providing for the future separation of husband and wife was neither illegal nor immoral, but was warranted by analogies of the law. and by direct authority ; that covenants, where separation had taken place, were established by repeated decisions, and that covenants providing for the future separation of husband and



wife did not militate more strongly against the policy of the law; both must stand or fall together, and that all the arguments which could be urged against the one had been urged against the other, and were overruled above a century ago; that if it be illegal to provide for the possibility of a future separation, as tending to facilitate such an event, it cannot be less so, to abet and support an actual separation, and thereby impede a reunion of the parties. It was urged, on the part of the defendant, that in none of the cases cited at the other side, was there any provision expressly made in case of future separation, and that, therefore, the Court would not be inclined to extend the principle of these determinations an iota further than they are compelled by express authority to do; that it is contrary to the policy of the law, and to good morals, to enter into any contract which has a direct tendency to loosen the bond of union between husband and wife; and that the same objection, in some degree, applies to contracts for separate maintenance even after an actual separation, yet that it holds in a stronger degree before such separation, inasmuch as it is of more evil consequence to facilitate the happening of a mischief, than to provide for it after it has happened. However, the Chief Justice, Lord Ellenborough, said, that the question appeared to have been laid to rest for a long period by repeated decisions, and the uniform practice of the Courts; that if it were a new question, whether any contract could by law be made, which tended to facilitate the separation of husband and wife, he should have thought that it would have fallen in better with the general policy of the law to have prohibited any such contract; but that they were now become inveterate in the law, and that the present could not be rejected without saying, that all contracts which have the same tendency are vicious, which would extend, for aught his Lordship could see, to provisions for pinmoney, or any other separate provision for the wife, which tends to render her independent of the support and protection of her husband; and that it had been so long established, and by so many decisions,

that the courts will give effect to contracts for separate maintenance, that it could not now be called in question. His Lordship also said, that he thought the cases of *Nichols v. Danvers*,<sup>e</sup> and *Gawden v. Draper*,<sup>f</sup> governed the present cases. However, it now appears in Mr. Raithby's edition of Vernon, which has been published since the decision of *Rodney v. Chambers*, that there was no agreement for a future separation put in issue in the pleadings in *Nichols v. Danvers*,<sup>g</sup> and that no such agreement had been entered into. This case is, of course, no authority upon the present subject.

Of deeds for separation to take place with consent of trustees.

*St. John v. St. John*<sup>h</sup> is the next case upon the subject of covenants for a separate maintenance, upon a future separation, *with the consent of trustees*. In this case it appeared, that Lord and Lady St. John having lived separate under articles of separation, a reconciliation took place, upon which occasion another instrument was executed by them, and two trustees, in which it was provided, that Lady St. John might, at any future time, *with the assent of the trustees*, or the survivor of them, his executors, &c., separate from her husband, and take away her children, and, upon such separation, reviving the provisions of the former articles. The bill was filed by Lord St. John, after a second separation, to have these instruments delivered up. The answers were referred for having introduced scandalous and impertinent matter; and the Master having reported in favour of them, exceptions were taken to his report, in discussing which the legality of the agreement was considered. It was contended for the plaintiff, that husband and wife could not stipulate that, at a future period, they will not live together; while, on the other hand, it was argued, that such a contract was sustainable, and that the specific execution of it would be enforced in a court of equity. Lord Eldon gave his opinion very much at length, expressing strong disapprobation of every species of agreement between husband and wife for a separation, and a

<sup>e</sup> 2 Ver. 671.  
<sup>f</sup> 2 Vent. 217.

<sup>g</sup> 2 Vern. 672. note 1.  
<sup>h</sup> 11 Ves. 526.

separate maintenance, and particularly of that kind then in discussion ; but saying at the same time, that “ if dicta had followed dicta, and decision had followed decision, to the extent of settling the law, he could not, upon any doubt of his as to what ought originally to have been the decision, shake what is the settled law upon the subject.” His Lordship also added, that he thought it better that the case should go to the House of Lords, than that the law should remain in its present state upon a point connected with the very well-being of society. However, no decision has since taken place on the case, as it terminated soon after in a compromise.

Such are the authorities on the subject of deeds for a separate maintenance in the event of a separation, to take place at a future time, with the approbation of third persons ; and although it cannot be attempted to justify these provisions made with a view to a future separation, yet it must be admitted, that the agreements in *Rodney v. Chambers*, and *St. John v. St. John*, were the least objectionable of their kind. For in both cases a separation had actually taken place previous to the execution of the deeds which were the subjects of discussion, and these instruments were prepared for the very purpose of bringing husband and wife together again. And one of the inducements held out to the wives for reconciliation was, that if the husbands should renew the ill-treatment for which their wives had before parted from them, and should thereby render it necessary for them again to separate, that then they should be permitted to live apart, and that their husbands should pay them a separate maintenance during that separation. These instruments have a tendency rather to reconcile than to separate husband and wife, and the more so, as the future separation could not take place capriciously and without good cause, but was to be approved of by third persons ; intending thereby, as Mr. Justice Lawrence observed in *Rodney v. Chambers*,<sup>i</sup> instead of having recourse to the

<sup>i</sup> 2 East, 283.

ecclesiastical court for alimony, to create a domestic tribunal to consider whether they should live separately from their husbands, and have separate maintenance. These are circumstances which render the above cases essentially different from *Hoare v. Hoare*,<sup>j</sup> where the deed was before marriage, and make them much less liable to objection than any instance of an agreement of the same kind entered into after marriage and during cohabitation, and where there had not been any previous separation or disagreement.

Deeds for separation to take place at the sole will of the wife, not valid.

In the above case of *Lord Rodney v. Chambers*, the Court only decided, "That a covenant for separation and separate maintenance, *with the consent of trustees*, was good; not that a covenant was good generally, that a wife might separate herself from her husband whenever she pleased; for that, as Mr. Justice Lawrence observed in *Chambers v. Caulfield*,<sup>k</sup> would be to make a husband tenant at will to the wife of his marital rights." And accordingly it has been since decided, on a writ of error to the exchequer chamber, that if the covenant be for a separate maintenance, upon a separation at the sole will of the wife, it will not be valid. This was the decision in *Durant v. Tilley*,<sup>l</sup> where in a deed of separation between husband and wife, (reciting subsisting differences,) he covenanted with a trustee to pay him an annuity of 500*l.* during the joint lives of himself and his wife, in case she should live separate and apart from her husband, and should take one of her children by her said husband to live with her. The husband pleaded to a declaration on this covenant, that after the making of the said indenture his said wife cohabited with him for seven years, and that afterwards, without his consent, and against his will, she quitted and left him, and ceased to cohabit with him; and to this plea the plaintiff demurred. The Court of Exchequer gave judgment for the plaintiff, and the defendant brought a writ of error; and one of the grounds on which it was contended that the action could not be sup-

<sup>j</sup> 2 Ridgeway's Parl. Cas. 268.  
<sup>k</sup> 6 East, 252.

<sup>l</sup> 7 Price, 577.

ported was, that the deed being made in contemplation of a future separation of a husband and wife, *at the pleasure of the wife*, it was contrary to the policy of marriage, and void in law. The court of errors reversed the judgment, as it appears, on the ground that the separation was to take place at the pleasure of the wife ; for Chief Justice Abbott, afterwards speaking of this case in *Jee v. Thurlow*,<sup>m</sup> said, "It was a case by itself, and distinguishable from all that preceded it. The ground of the opinion given by my Lord Chief Justice Dallas and myself there, was, that the agreement was for a future separation, to be adopted at the sole pleasure of the wife, the parties being, at the time of making the agreement, living together and in amity."

The result of the above decisions seems to be, that there may be a valid agreement before or after marriage between husband and wife for a separate maintenance, in the event of a future separation, provided the separation is to take place with the consent of third persons. But that if the separation is to take place solely at the pleasure of the wife, such contract will be void.

<sup>m</sup> 4 D. & Ry. 19.

## CHAP. VI.

OF THE EFFECT OF ARTICLES OF SEPARATION UPON THE  
RIGHTS OF THE HUSBAND OVER THE PERSON OF HIS  
WIFE.

Contract  
of husband  
to permit  
wife to live  
separate  
and apart,  
enforced.

As agreements for separation between husband and wife generally contain a provision, not only for the payment of a separate maintenance to the wife, but also that it shall be lawful for her to live separately and apart from the husband, wholly freed and discharged from all government and restraint, as if she were sole; it is evident, that he may violate this latter part of the engagement by a forcible possession of her person, as he may the former by not paying the stipulated allowance. And, accordingly, the law has provided a remedy for this breach of contract, by restoring the wife to her liberty whenever it has been invaded. However, it cannot fail to appear strange, that, although the jurisdiction of our courts of justice to entertain a suit for the enforcement of a contract between husband and wife, for the payment of a separate maintenance, has been frequently questioned, on the ground that it facilitates and encourages separation between them; yet there does not seem to have been the slightest hesitation to recognise and enforce that part of the contract which bargains for the wife's freedom from the marital authority. There are many cases decided at law by some of our ablest lawyers, which have gone the length, never yet required of a court of equity; namely, of separating the wife from the husband, where he has violated his engagement that she should live apart from him, by seizing on her person, and insisting on her cohabiting with him. The cases which have been decided with respect to separate maintenance affect the juris-

Courts of  
law separate  
wife from the  
husband,  
when her  
person has  
been seized  
in viola-  
tion of his  
covenant,  
that she  
shall

diction of the Ecclesiastical Court only incidentally by giving facility to separation, and rendering reconciliation difficult; but the law has interfered much more directly and unequivocally with the authority of the Spiritual Court in these cases, where it actually takes the wife from her husband, when he has seized her, and detains her against her will, in violation of his agreement that she should live apart from him. It is not, however, to be understood, that a court of law would interpose in this way under such circumstances, if the husband had sued for, and obtained a decree for restitution of conjugal rights in the Ecclesiastical Court; on the contrary, it is presumed it would follow the example of a court of equity, and decline to interfere.

*Lister's case*<sup>a</sup> is the first instance to be met with in the books, of a wife having been taken from the custody of her husband by a court of law, in pursuance of his agreement with her that she should live apart from him. There, Mr. Lister, who had married Lady Rawlinson, a widow, covenanted, by a writing duly executed, to allow her a certain sum for every year, and that she might live separately from him, to which she agreed. They, accordingly, lived separately, but Lister, pretending to be reconciled, she refused; on which, he, with another person, forced her into a coach, as she was coming from church on a Sunday, and carried her into the Mint, and kept her in strict confinement. She was brought up by habeas corpus, and her husband moved, that the Court would not interfere between the husband and the wife; but the Court said, "An agreement between husband and wife to live separate, and that she shall have a separate maintenance, shall bind them both until they both agree to cohabit again; and if the wife be willing to return to her husband, no court will interfere or obstruct her. But, as to the coercive power which the husband has over his wife, it is not a power to confine her; for, by the law of England, she is entitled to all reasonable liberty, if her behaviour be not very bad, and,

<sup>a</sup> 8 Mod. 82. 1 Strange, 478.

Contract by husband to permit his wife to live apart from him, is a formal renunciation of the marital right to seize her person.

therefore, she shall now be set at liberty, if it is her pleasure to be;" and she was, accordingly, discharged out of the custody of her husband. *The King v. Mead*<sup>c</sup> was decided to the same effect thirty-seven years after Lister's case, and the law does not seem to have been shaken in that interval of time. Here, a habeas corpus issued in the vacation, at the instance of the husband, John Wilkes, esquire, to bring up the body of Mary Wilkes, his wife, and the daughter of Mary Mead, before Mr. Justice Denison. Mrs. Mead now brought her into Court. The substance of the return to the writ was, "That her husband (having used her very ill) consented to her living alone, in consideration of a great sum, which she had given to him out of her separate estate, and executed articles of separation, and covenanted, under a large penalty, never to disturb her, or any person with whom she should live. That she lived with her mother, at her own earnest desire, and that this writ of habeas corpus was taken out with a view of seizing her by force, or some other bad purpose. The Court held this agreement to be a formal renunciation by the husband of his marital right to seize her, or force her back to live with him." And their Lordships added, that any attempt of the husband to seize her by force and violence, would be a breach of the peace. They also declared, that any attempt made by the husband to molest her in her present return from Westminster Hall, would be a contempt of the Court. And they told the lady, that she was at full liberty to go where, and to whom she pleased. Lord Kenyon was of the same opinion afterwards, in the case of *The King v. Edgar*,<sup>d</sup> where a habeas corpus had issued, directed to Alexander Edgar and his three sons, commanding them to produce the body of Anne Edgar, the wife of the said Alexander; in compliance with which they brought her into Court. Mr. Erskine read an affidavit made on the part of Mrs. Edgar, stating, that her

<sup>c</sup> 1 Bur. 542.

<sup>d</sup> Ridgway's Hardwicke, in a note, 152.



father left his property in trust for her, not having any confidence in her husband, who treated her with great severity. That articles of separation were agreed upon, and in consideration of 3000*l.* he was to resign all claim to her property. That he afterwards got possession of her, and kept her confined, alleging that she was a lunatic. On the part of the husband, it was admitted, that the articles had been agreed upon, but that there were other articles to be executed, which never were executed, namely, an engagement to free him from all such debts as she should contract. Lord Kenyon said, that, unless she had done something notoriously to destroy the articles, it was settled, that the husband had renounced all right to the wife. And, in answer to a proposal made by Mr. Bearcroft, who was counsel for Mr. Edgar, that she should be removed into the hands of some third person, his Lordship said, "We cannot put her into custody : the husband has no claim after the articles of separation." To which Mr. Bearcroft replied, "I agree to that ; but, when our affidavits are read, it will appear that there are no articles." But Lord Kenyon asked the lady if there was any place she wished to go to ? She answered, that there was no particular place ; but, if the Court pleased, she would go into any genteel lodging, under the care of any servant their Lordships might think proper to appoint. To which his Lordship replied, "You are now a free woman, you may go where you please ; and, if you are apprehensive of any violence, you shall have an officer of the Court to protect you." And Mr. Justice Buller expressed himself to be strongly inclined to the same opinion in the case of *The King v. James Winton*,<sup>o</sup> where the question was, whether the return to a writ of habeas corpus directed to the defendant to bring up the body of Margaret Greygoose was regular or not ? and, in support of the rule for an attachment against the defendant, J. Greygoose made an affidavit, in which he stated, that his wife had been seduced from him, in June, 1790, by the

defendant; that she lived with him for two years, and had returned to her husband in the month of May preceding; that, in about three days afterwards, she returned to the defendant, in consequence of a letter from him, in which he threatened to expose her conduct if she did not return; that deponent believed that he detained her by threats; that she was now living in a state of adultery with him, but that she was desirous of returning to her husband. The counsel for the defendant not only endeavoured to sustain the return as being regular, but insisted, that the writ should not have issued, as the prosecutor, the husband, *having entered into articles of separation with his wife*, had now no control over her. And Justice Buller, Lord Kenyon being absent, having held the return to be irregular, said, "If this case turn out to be like that in *Burrow*,<sup>f</sup> I am strongly inclined to think, that this would be an answer to the writ; but this is not at present made out; and if the affidavit on the part of the prosecution be true, that the wife is desirous of returning to her husband, and is prevented by fear, or by the threats of the defendant, this case is distinguishable from that cited." Here we find the authority of Mr. Justice Buller added to that of Lord Kenyon, as to the effect to be produced by an article for separation upon the rights of the husband over the person of his wife. And if these cases be law, (which has been seriously doubted by the very highest authority,<sup>g</sup>) they would prove, that a husband may, with the consent of his wife, divest himself, without the power of re-assumption, of all power over her person and her actions, for the uniform language of the judges who decided them was, that the agreement was a renunciation of the martial right. It must be confessed, that such opinions are contrary to the strict notions of the common law on the rights of marriage; for that law considers marriage as indissoluble, and its rights unalienable, except by the authority of the Legislature, or by the sentence of the

<sup>f</sup> *Mary Mead's case*, Bur. 542.

<sup>g</sup> See Lord Eldon's judgment in *St. John v. St. John*, 11 Ves. 532.

Ecclesiastical Court, the former jurisdiction alone having the power of dissolving marriage, and the authority of the latter extending no farther than to a divorce *à mensâ et thoro*. But the cases cited seem to give to husband and wife the power of pronouncing a sentence of divorce between themselves, and to confer upon the courts of law a jurisdiction to enforce the execution of that sentence. It has also been held to be a necessary consequence of such separation by consent, that the husband, by the means of it, divests himself of his right to bring an action for criminal conversation had with his wife subsequent to the separation. This doctrine was first laid down and acted on by Lord Kenyon at Nisi Prius, in the case of *Weedon v. Timbrel*,<sup>h</sup> and afterwards approved of by the Court of King's Bench.<sup>i</sup> His Lordship nonsuited the plaintiff, on the ground that the loss of the comfort and society of the wife being the gist of that form of action, the husband, who had voluntarily agreed with his wife that he and she should live apart from each other, had no claim for compensation in damages. And on a motion for a new trial, the Court above agreed with his Lordship in the principle that the loss of comfort was the foundation of such a suit, and that where the husband has separated himself from his wife, he cannot be said to have lost the society which he had before renounced, and therefore not to have sustained the injury which he had imputed to the defendant. Indeed, so long as it continues to be law, that a husband who has by agreement separated himself from his wife, has abandoned his marital rights over her, and cannot reclaim her without her consent,<sup>j</sup> so long, it must necessarily follow, that he cannot maintain an action for criminal conversation had with her subsequent to such separation. The authority of this case was afterwards questioned in *Chambers v. Caulfield*,<sup>k</sup> but does not seem to have been weakened by any of the arguments employed against it. In that case, there was a

Contract for separation between husband and wife, destroys husband's right to maintain an action for criminal conversation.

<sup>h</sup> 1 Esp. N. P. C. 16.

<sup>i</sup> 5 T. R. 357.

<sup>j</sup> Meade's Case, Lister's Case,

Edgar's Case, Greygoose's Case, supra.

<sup>k</sup> 6 East, 244.

verdict for 2000*l.* damages against the defendant for adultery with the plaintiff's wife, who had been separated from her husband, by their mutual agreement in writing, for some time ; and on a motion to set aside the verdict, it was relied on for the defendant, on the authority of *Weedon v. Timbrel*,<sup>1</sup> that there being a deed of separation between plaintiff and his wife, and they living separately, he had no ground for sustaining his action. It was objected to *Weedon v. Timbrel*, on the part of the plaintiff, that it was not founded upon any former precedent in the law ; that all the principles of morality and of public policy were against it ; that the foundation and continuance of society depended on the good conduct of the marriage state, and on the government of the husband ; and that the loss of the comfort, society, and assistance of the wife, at the time, cannot be the gist of this action, for then, though the adultery were before the separation, yet, if it were not known to the husband till afterwards, he could not maintain this action. But Lord Ellenborough, in delivering the opinion of the Court, said, " That it was unnecessary to say any thing more respecting the deed of separation between Mr. and Mrs. Chambers, except this, that it seemed not to have meant to provide for any separation, but such separation as should take place with the approbation of the trustees. That it could not, according to its true construction, be holden to have provided for any separation without the consent of the trustees, and that the Court thought that the consequence was, that if Mrs. Chambers left her husband without the approbation of the trustees, (and that upon the evidence before them, she must be taken so to have done,) then she was not at the time of the criminal intercourse living separate from him with his consent, and of course the event and situation provided for in the deed had not happened, and that in that view of the case, there could be no question but that the plaintiff's right to recover was not affected by the deed ; and that even if she had left her

husband *with* such approbation, still, that he had not, in this case, (as the husband was held to have done in *Weedon v. Timbrel*,) given up all claim to be derived from her comfort, society, and assistance. That the consequence was, that the case of *Weedon v. Timbrel*,<sup>m</sup> allowing it the fullest effect according to the terms, could not be considered as an authority against the plaintiff in the present action."

When Lord Eldon said, in the above case, that the husband had not given up all claim to his wife, his Lordship alluded to one of the covenants in the deed, by which it was agreed, that the wife "should educate some of the children, and have a liberty of attending others of them at their father's house, when they should be so ill as to require a mother's attention;" which he considered to leave such an interest in the wife to the husband, notwithstanding their agreement to live separate, as to give him a right of action for the loss of it.

<sup>m</sup> 1 Esp. N. P. C. 16. 5 T. R. 357.

## BOOK V.

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### CHAPTER I.

#### OF THE EQUITIES ARISING FROM THE PROPERTY OF THE WIFE.

Protection of equity to married women not confined to their separate property.

Instances in which equity exercises its authority against legal claims of husband in favour of wife.

It has been seen, in a former part of this Essay, that equity so far modifies the maxim of law by which the personal property of the wife, and the rents and profits of her real estate, during her life, become vested in her husband, that if such property be transferred to her by deed, or will, or in any other way, and the gift appears to have been intended for her separate use, free from her husband's control, the intent of the gift will be upheld, and the wife be protected in the use and disposition of it against his legal claim. And this interposition of equity in favour of married women is not confined to the protection of their separate property; this Court extends its care in the defence of their interests still farther, for there are other occasions, afforded by the wife's title to property, of which the Court avails itself to exercise its authority against the legal claims of the husband. For instance, if he require the assistance of the Court to procure the possession of any part of his wife's fortune, it will be refused to him, unless he makes a provision for her out of it, or unless he shows that he has already purchased it, or adequately provided for her. If the husband ill treat his wife, and force her to leave his protection, or if he abandon her, equity will interfere,

and retain for her a suitable subsistence out of her fortune, which happens to be under its management. So, if she pledge her real estate, or advance her separate property for the purpose of supplying her husband's wants, equity will take care that she shall be indemnified out of the husband's assets after his decease. And, lastly, if the wife have been a ward of the Court of Chancery, and have been married without its consent, not only the husband will be punished for the contempt, but he will not be discharged from it, until he has made a sufficient provision for her out of her own estate. These are the equities arising from the property of the wife, out of which only such relief can be supplied.

If a husband, or any person claiming in his right, seeks to reduce into possession that part of the wife's portion, which is of an equitable nature, Chancery will, in most instances, insist on a provision for her out of it, where no settlement or an inadequate settlement has been made upon her. If the wife's fortune be within the reach of the Court, as if it were vested in trustees, or if it have been paid by the trustees into Court,<sup>a</sup> or if it be in any other situation, in which it would be under the direction and control of a court of equity, that court will not suffer it to be removed out of its jurisdiction, until an adequate provision shall be made for her, unless she has been already sufficiently provided for, or unless, on her personal examination, she waives the benefit of this protection: and this is called "the wife's equity."

But, although it is so styled, from which it might be supposed to be peculiar to the wife, yet in practice, the benefit of it is always extended to the children of the marriage. Indeed there is no instance of an arrangement for a provision for the wife, in satisfaction of this claim, in which the children have not been included. And this right of the wife fastens itself so unalienably on all her equitable personalty, (except her trusts of terms for years,<sup>b</sup>) and on the

Wife's equity extended to the children of the marriage also.

<sup>a</sup> Macaulay v. Philips, 4 Ves. 17.

<sup>b</sup> See *infra*, Chap. IV.

Wife's equity may be satisfied out of husband's property.

rents and profits of her equitable real estate, that it cannot be disengaged from them in the hands even of a purchaser for valuable consideration.<sup>c</sup> However, although the wife's claim forms such a lien on her equitable interests, which cannot be discharged, except by her own release given on her examination in court, or by a provision on her, yet that provision need not be secured out of this fund, for if the husband have any property of his own, he may provide for her out of it, and it will be deemed a full satisfaction of her demand. Indeed, the settlement that is required from the husband in discharge of the wife's equity, is never ordered out of her portion, where the husband has any sufficient property to settle.<sup>d</sup>

If husband have once possessed himself of wife's equitable property, her equity cannot be enforced.

But it is right to observe, that although equity acknowledges and enforces this claim for the security of married women, yet it does not controvert the legal title of the husband to his wife's personalty, and to the rents and profits of her real estate during her life; on the contrary, it admits the law upon the subject to its fullest extent; for if he have once acquired the possession of that property, though it had been of an equitable nature, this court will leave him undisturbed in the enjoyment of it. Before a suit has been instituted to enforce this claim of the wife, the husband may, if he can, get her property into his hands, and her trustee may, if he thinks fit, give that property to him, and the court will not interfere.<sup>e</sup> But if a bill have been once filed, or any other proceedings commenced for that purpose, the trustee will not be at liberty to dispose of the wife's property in that way, for if he should pay over any of her money after such suit has begun, the court would hold it a payment by wrong, and would set it aside.<sup>f</sup>

Trustee may pay wife's money to husband before bill filed for account of it, but not afterwards.

And this claim of the wife attaches not only on that part of her fortune which is purely equitable, and which the husband can acquire solely by suit in equity, being vested in trustees, and not being attainable without an application

<sup>c</sup> See *infra*, Chap. IV.

<sup>d</sup> *Middlecomb v. Marlow*, 2 Atk. 520.

<sup>e</sup> *Glaister v. Hower*, 8 Ves. 206.

<sup>f</sup> *Murray v. Ld. Elibank*, 10 Ves. 90.

<sup>f</sup> *Macaulay v. Phillips*, 4 Ves. 18.



to that court; but it has been held to extend also to legacies bequeathed to the wife, though they are not vested in trustees, and though the husband may reduce them into possession by suit in the ecclesiastical court. And accordingly, if the husband should proceed in the spiritual jurisdiction, to recover a legacy bequeathed to his wife, the Court of Chancery will grant an injunction to restrain him, which will not be dissolved until he makes an adequate provision for her.<sup>g</sup>

No doubt this power which the court exercises of restraining the husband from proceeding in the Ecclesiastical Court for the recovery of his wife's legacy, until a provision be secured to her, seems to be at variance with the rule, that equity will not interpose for a provision for her, except out of that part of her fortune which is purely equitable. However, when it is recollected that executors and administrators are treated as trustees of the fund which has been left to their charge, and in that character are subject to the jurisdiction of a court of equity, it will appear that the unpaid legacy of the wife is as much an equitable interest as any other species of property, and that when the Court of Equity enjoins the husband from suing for it before the ecclesiastical judge, until he complies with the usual terms, such an interference is in perfect accordance with the spirit and meaning of the above rule.

As to that part of the fortune of the wife which is tangible, and capable of immediate possession, without a suit at law or in equity, or the right to which must be asserted by an action at law, before the possession of it can be acquired, this Court will not interfere with it, or disturb the husband in the exercise of such his legal right with respect to it. There is, however, this marked distinction between the legal and equitable choses in action of the wife, that the husband may enforce the payment of the former in a court of law, and use his wife's name for that purpose without her consent, by which her interest in them will be completely

Husband may use his wife's name for the recovery of her legal and equitable choses

<sup>g</sup> Tothill, 114. 1 Strange, 238. 739. in a note. Contra, Andrews 503. Prec. Chan. 548. 5 Ves. v. Craddock, Wyatt's P. R. 248.

in action without her consent, but her interest in the latter is not bound without her consent.

barred, but as to the latter, although he may use his wife's name in suing for the recovery of them, yet her interest in them is not bound without her consent, and that taken on her examination in court.<sup>h</sup>

There is no intention of inquiring here into the origin of this doctrine ; such an investigation is not necessary for the purposes of this essay ; it is sufficient to know that it is a settled rule of our courts of equity, and has been acted on from a very early period. Lord Eldon calls it "A mere creature of the Court, founded altogether on its practice ;" <sup>i</sup> and no one, who looks to the object of it, and observes the application of it, can doubt that it has introduced a wholesome qualification of the common law. Lord Hardwicke, speaking of it, says, "It resembles the paternal care which equity exercises for the benefit of orphans ; and that as the father would not have married his daughter without insisting on some provision, so equity, which stands *in loco parentis*, will not do it." And on a due consideration of the cases, this paternal regard will appear to be the genuine spirit in which the court acts in the application of this doctrine. The late Master of the Rolls, Sir William Grant, in his judgment on the case of *Murray v. Lord Elibank*,<sup>k</sup> says, upon the same subject, "With regard to this equitable right, which a married woman has in this Court to a provision out of her own fortune, before her husband reduces it into possession, it stands upon the peculiar doctrine of this Court. It is vain to attempt by general reasoning, to ascertain the extent of that doctrine ; we must look to the practice of the Court itself." In the following pages it is attempted to collect that practice, and to arrange the cases in which it is to be found, in that order which will best explain and elucidate the principles on which the Court of Chancery interferes where this rule is applied.

<sup>h</sup> *Langham v. Nenny*, 3 Ves. 469. *Macaulay v. Phillips*, 4 Ves. 18.

<sup>j</sup> *Jewson v. Moulson*, 2 Atk. 420. <sup>k</sup> 13 Ves. 6.

<sup>i</sup> *Murray v. Lord Elibank*, 10 Ves. 90.

However, when it is said that a court of equity will insist on a provision for a married woman out of her equitable interests, it is not to be understood, that where she has property of that nature, a provision will at all events be enforced for her; for in fact a court of equity has no power of exacting a settlement for a married woman out of this part of her portion, unless her husband, or some person claiming through him, seeks to acquire the possession of it. For if the husband does not require the possession of his wife's fortune, and will be contented with the interest of it, to which he has a right so long as he maintains her,<sup>1</sup> he cannot be obliged to make any settlement upon her. Even where there has been an order of the Court that he should go before the Master and make proposals for a settlement, and he refuses to do so, the Court will not go so far as to take the produce from him, or to prevent his receiving the interest, except he has already had a large part of her fortune without making any provision for her.<sup>m</sup> However, she would derive this advantage from his abstaining to reduce her equitable choses<sup>n</sup> in action into possession, that she would have the chance of taking them ultimately by survivorship.

Wife's equity not enforced, unless husband claims the possession of her equitable interests.

This "Equity" was for a long time confined to the personal fortune of the wife; but Lord Alvanley extended it, with some hesitation, to the rents and profits of her real estate, in which she had an interest for life.<sup>n</sup> It had been also contended, that the wife had this claim to a provision only out of a principal sum, and that her equity did not embrace the case of a mere life interest; and the reason given for the distinction was, that the husband becomes the absolute purchaser of the life interest by the marriage, in consequence of the obligation to maintain his wife, which he thereby contracts. But it is now settled that the life interest is subject to this claim when the husband has deserted his wife, and left her without means of support, or

Wife's equity extended to rents of real estate.

Life-interest of the wife, subject to her equity only when she is abandoned by her husband, or when he becomes bankrupt or insolvent.

<sup>1</sup> Sleaford v. Thorington, 2 Ves. sen. 560.

<sup>n</sup> Burden v. Dean, 2 Ves. jun. 607.

<sup>m</sup> Bond v. Simmons, 3 Atk. 20.

in the hands of his assignees, when he has become bankrupt or insolvent, but in these instances only.<sup>o</sup>

Wife's equity a present maintenance, where husband is bankrupt or insolvent.

If husband be solvent, this provision commences only from his death.

When the Court requires this provision for a married woman, it is governed, as to the time from which that provision is to commence, altogether by her necessities ; for if the husband be rendered unable to maintain her, in consequence of his bankruptcy or insolvency, the maintenance provided for her is always a present one ;<sup>p</sup> but if the husband be competent to her support, the maintenance is to commence only from his death.<sup>q</sup> And a settlement made on such an occasion is considered as made on so good a consideration, that it will be deemed valid against the husband's creditors, though it had been entered into after marriage, and although there was no agreement to that effect previous to the marriage, and though the husband was indebted at the time of such settlement.<sup>r</sup> And the court has gone still further, for, if after marriage, the wife being entitled to a portion, which the husband cannot touch without the aid of the Court, and the trustees will not pay it unless the husband makes a settlement ; if the husband do agree to it, and do that which the Court would decree, it would be held a valid settlement against the husband's creditors.<sup>s</sup> At first, indeed, this equity was administered only in cases where the husband required the assistance of the Court to get the possession of his wife's fortune, and the reason then given for putting him under terms in such a case was, that as he sought equity he must do equity. But now this protection is extended to all instances, where the equitable interests of the wife are the object of the suit, whether the Court be applied to by the husband or his assignees, to obtain the possession of them, or by the wife or her trustees, or by any other person on her behalf, praying for a provision for her out of them.

<sup>o</sup> Pryor v. Hill, 4 Br. C. C. 139.

<sup>p</sup> See infra, Chap. III.

<sup>q</sup> See infra, Chap. II. and IV.

<sup>r</sup> Moor v. Rycault, Prec. Chan.

<sup>22.</sup> Hinton v. Scott, Moseley, 336.

Middlecombe v. Marlow, 2 Atk. 519.

<sup>1</sup> Fonb. 90.

<sup>s</sup> Wheeler v. Caryl, Amb. 121.

However, as has been above stated, a married woman has other equities besides this one, which is peculiarly called the wife's. It is now an unquestioned head of equity, that if a woman be deserted or ill treated by her husband, a provision will be secured to her by the Court out of any portion of her fortune which may happen to remain in its hands. The nature of this equitable relief is this, that whenever a husband abandons his wife, and leaves her without the means of subsistence, or else when he treats her so ill, as to force her to quit his house, in either of these events, if she file a bill by her next friend against him, praying that an allowance may be secured to her out of the produce of her own fortune, which is in the power of the Court, a decree will be made according to this prayer. But the dispensation of this favour on such occasions arises wholly from the wife's fortune, which the Court has within its reach ; her maintenance must, if at all, be served out of that, for without it equity has no jurisdiction to interfere, and the wife must go without redress. Whatever the nature and extent of her sufferings may have been, whether she has been left by her husband destitute of the means of support, or has been driven from her home by the cruelty or violence of his demeanour towards her, however large her portion may have been, if he have reduced it into possession, or if it be of a legal quality, equity can give her no relief, as neither the person nor the property of the husband can be made liable in that court to a maintenance for his wife under such circumstances. But when the wife has a fund still in court, and has been reduced to such extremities, then if she file a bill by her next friend against her husband, charging the want of support arising from his desertion or ill treatment, and if she prove these charges, a separate maintenance will be decreed to her, to be paid out of that property, and proportioned to it. And, indeed, it may be truly said that the course of our courts of equity scarcely affords an example, where the law of baron and feme, which gives an interest to the husband in the property of his wife, has not been forced to yield, when the Court

The equity of a married woman to a provision out of her equitable interests, when she has been abandoned or ill treated by her husband.

has a control over that property, whenever the assertion of that legal right might work an injury to the wife. Thus we have already seen, that if she have property of any description vested in trustees or placed in any other situation which renders it subject to the power of this Court, her husband will not be suffered to remove it, notwithstanding his legal rights, until he makes an adequate provision for her, unless she consents, or unless he can show that he has already made himself the purchaser of it.<sup>t</sup> But although the title of the wife's equity, which is given to this branch of the practice of the Court, is confined to such instances of its interference, yet the other examples of protection and support afforded to the wife in the cases of cruelty or desertion, seem to have as strong a claim to the same appellation, and to deserve to be classed under the same head, for they are both derived from the same source, namely, the favour of the Court and the equitable property of the wife.

Provision  
for wife  
deserted or  
ill treated  
by her hus-  
band, al-  
ways a  
present in-  
come, and  
continues  
only till  
husband  
returns to  
his duty.

The provision which is secured to a married woman under the circumstances of desertion or ill treatment by her husband, resembles both the wife's equity and her separate property, though, in fact, it is substantially different from both. It is like her separate property, because it is payable to her separately and distinctly from her husband; but then it is unlike separate property in this respect, that she has not the complete command of it, as she cannot anticipate the future gales by a sale, or other disposal of it, but must wait until they become due. It is like the wife's equity, because it is an arrangement by the Court for her security, resulting from her equitable interests; but it is unlike the wife's equity, because it is always a present income during the husband's life, and intended to relieve immediate necessities, whereas the wife's equity is future, and is intended, not as the means of present support, but as the security for a future subsistence after the husband's death, except, indeed, he becomes incompetent to support her by bankruptcy or insolvency, and then, indeed, it is a

<sup>t</sup> See Book II. Chap. I.

present provision.<sup>u</sup> There is this further difference between this separate maintenance and the wife's equity, that the former continues only until the husband returns to his duty and conducts himself towards her as he ought, while the latter continues from the period of its commencement to the death of the wife. And nothing can more strongly evince the vigilance of a court of equity in the interests of married women, than the enforcement of these provisions; for, by such arrangements, a settlement may be secured to her out of her fortune, not only after her husband's death, but even during his lifetime, if it should be expedient for her, thus guarding her against the possibility of future danger, and applying a remedy for her present wants.

The principle upon which courts of equity act when they apply the trust fund of a married woman, who has been abused or abandoned by her husband, to her separate maintenance, is this, that as the interest of her fortune is intended for the support of both husband and wife,<sup>x</sup> if either he will not maintain her, or else demean himself in such a manner towards her, that she cannot with safety remain under his authority to receive a maintenance from him, that interest shall be taken from him and given to her.<sup>y</sup> So long as he maintains her, the Court cannot refuse that interest to him, unless he have already received a large share of her fortune, and refuses to make a settlement in consideration of that part which remains, and then, indeed, neither principal nor interest shall be given to him.<sup>z</sup> It may be right, however, to remark, that when it is said that a separate maintenance will be secured out of her trust property to a married woman placed under the circumstances stated above, this must not be understood to mean any fund of that kind to which she has a claim, for to give her a title to such relief, it must be a fund immediately pro-

Interest of wife's fortune cannot be refused to husband, so long as he maintains her.

Provision for woman deserted by her husband supplied only out of a present life-interest, not out of a reversion.

<sup>u</sup> Vide supra, Book II. Chap. III.

<sup>x</sup> Ball v. Montgomery, 2 Ves. jun. 197.

<sup>y</sup> Sleech v. Thorington, 2 Ves. sen. 560.

<sup>z</sup> Bond v. Simmons, 3 Atk. 20. Sleech v. Thorington, 2 Ves. sen. 560.

ductive, it must be a present life interest, and not a mere reversion or remainder to which she has a right, otherwise she will be as remediless as if she had no property in that Court.

Provision  
made for  
female  
ward of  
chancery,  
who has  
been mar-  
ried with-  
out con-  
sent.

The next occasion on which a separate provision is settled on a married woman by the authority and interference of a court of equity is, where she has been clandestinely married, while she was a ward of the Court of Chancery. And in this instance, as in the former, the Court avails itself of its power over the property of the wife, to direct a settlement for her out of it. However, the usual equity to which a wife is entitled out of her equitable interests, will not be sufficient; the Court will not rest satisfied with such a provision, but, in most cases, will insist upon the entire of her fortune being settled for her separate use during her husband's life, and the remainder after his death, if she survive him, thus combining the advantages of a separate maintenance and of the wife's equity. And such a settlement is almost always enforced as a punishment on the husband for his contempt in marrying a ward of the Court without its consent, and is a necessary preliminary to the clearing of the contempt, which will not be pardoned until this condition has been first performed. But then the Court is not upon all occasions equally strict; for it suffers itself to be governed, as to the nature and extent of the settlement that will be required, by the circumstances of the case. In almost every instance of a clandestine marriage, and under the most favourable circumstances which can be stated, the husband has been obliged to settle the entire of his wife's fortune upon her for her separate use for her life, with remainder to the issue of the marriage. In one case, however, where the parties were equal in rank and fortune, and where the husband had made an ample settlement out of his own estate, with a liberal allowance for pinmoney; that was deemed a sufficient satisfaction for his offence.<sup>a</sup> But if there be a gross inequality between them, either in their

Settle-  
ments on-  
female  
wards of

<sup>a</sup> Ball v. Coutts, 1 Ves. & Beames, 292.



circumstances, or in their stations in life, or if the husband have taken advantage of a confidence reposed in him, and has betrayed it, or have had recourse to stratagem or undue means for the procurement of the marriage, he will not only be forced to place the entire of her fortune beyond his own reach by a settlement of it upon her for her life, for her separate use, accompanied by the usual limitations to the children of the marriage, but he will be handed over to the law for the infliction of personal punishment, if the marriage have been promoted by an offence against the criminal code, as by conspiracy, or by perjury, or in any other unlawful way. And thus the Court, while it vindicates its own authority by chastisement for the affront put upon it, at the same time, by putting the wife's fortune into her own power for her life, secures to her an ample defence against future desertion or ill treatment, and also affords to her the opportunity of rewarding her husband's kindness, and of punishing his neglect. This provision also is carved out of the property of the wife, which is within the power of the Court, and that power extends to the entire of her property, as the Court of Chancery has a peculiar jurisdiction in the concerns of minors, which places their persons and their fortunes under its care and guidance, from which neither can be taken without its approbation. The Lord Chancellor, as the delegate of the King, is the trustee of the minor's estate, and, therefore, it is, that the property, which, in the case of an adult, would be of a legal nature, and on which all the legal consequences would attach, is, in the case of a female ward of the Court, purely equitable. Whatever it consists of, the husband of the minor cannot have it without the consent of the Court. But as the guardianship of Chancery ceases when the ward arrives at age, it might seem, that if the husband, who had married clandestinely, had the dexterity to avoid the resentment of the Court till that period, he might then have her equitable property on the usual terms of the wife's equity, and her legal property, without conditions, and that in this way the wife might be without protection as to her legal interests, and

chancery clandestinely married, where there is great inequality in the fortune or the station of the parties.

Power of  
chancery  
to punish  
for a clandestine  
marriage  
of a female  
ward, does not  
cease on  
her attaining  
her age.

the contempt escape unpunished. However, the Court of Chancery will not suffer itself to be thus cheated of a due obedience to its rules ; for it will not relinquish its jurisdiction, even after the wife has arrived at full age, until complete atonement has been made for the offence, sometimes by the imprisonment of the offender, but always by a sufficient settlement upon his wife. And no length of time will operate as a bar to this infliction. It is immaterial how many years have elapsed since the marriage, or how long the wife has been adult, for if her interests require the interference of the Court, it will, at any period, feel itself at liberty to punish this outrage upon its authority.<sup>b</sup>

And here it is to be observed, that although equity will not, in the instances above mentioned, assist the operation of the law, which gives the wife's property to her husband, where it may be prejudicial to her, yet it will not act by any direct interposition upon that property, or with the rules of law by which it is governed. Thus, in securing the wife's equity, the Court does not take any active measures against the husband, or against his wife's fortune ; it accomplishes its object rather by mediation than by force ; it receives proposals for a settlement upon the wife, and regulates the terms of it : but if these terms are not complied with, it does not lay its hands upon the fortune, and settle it according to its own will and pleasure ; it only refuses its aid to the husband, or to his assignee, to acquire the possession of it, if such assistance be necessary. Equity does not pretend to say, that the husband is not entitled by law to the possession of his wife's fortune, of whatever description it may be ; but it says this, that where that fortune is within the power of the Court, it will remain inactive, and will not exert its authority for the accommodation of the husband, unless he will first do what is fair and conscientious towards his wife, by making a provision for her. If, indeed, the husband have once taken the actual possession of the wife's equitable fortune, then the

<sup>b</sup> Ball v. Coutts, 1 Ves. & Beames, 292.

Court will not make a struggle to recover it from him,<sup>c</sup> which proves that equity claims no jurisdiction over even the equitable portion of the wife, and that the only mode by which it assists the wife with respect to it, is by refusing to assist her husband to remove it. The Court observes the same neutrality, where there has been a clandestine marriage with one of its female wards, for there it does not attempt to interfere with the rights that marriage gives to the husband over the property of his wife ; but as he has committed a contempt of the authority of the Court, he will not be discharged from the punishment attendant upon it, unless he will make such a settlement as the Court shall think suitable to the circumstances of the case.<sup>d</sup>

But it may be thought, that when a court of equity retains for a wife who has been abandoned or ill-used by her husband, the produce of her fortune to support her, it is a deviation from that rule of conduct which we have stated the Court always prescribes to itself with respect to the equitable property of a married woman ; namely, to abstain from the management or settling of it, while, at the same time, it refuses its assistance to the husband to reduce it into his possession ; yet, when it is considered that every woman has a right at common law to be maintained by her husband, if the Court applies her money to that purpose, it does only what the husband ought to do, and in so doing, though it interrupts his legal claim, it is by enforcing the performance of a legal duty.

However, it is not to be supposed that if the wife should have no equitable portion, she is to be altogether without remedy, for, though the Court of Chancery cannot afford it, yet the spiritual court can ; as, if she libel her husband there, and make out a case of cruelty or desertion against him, an allowance, called alimony, would be decreed to her, and the payment of it enforced against him by the peculiar process of that jurisdiction. Indeed, Lord Loughborough claimed a similar authority for the Court of

Ecclesiastical court gives alimony to wife deserted or ill-treated by her husband.

<sup>c</sup> *Glaister v. Hower*, 8 Ves. 206. *Murray v. Lord Elibank*, 10 Ves. 90.  
<sup>d</sup> See Chap. XI. Book V.

Writ of  
supplicavit for security of  
the peace  
by the wife  
against  
her husband.

Court of  
law may  
incidentally enforce a  
maintenance for  
a wife  
abandoned by her  
husband.

Chancery ; for his Lordship said, that “ if the wife applies to this Court upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, the Chancellor will allow her separate maintenance as incidental to that.”<sup>e</sup> But it is difficult to reconcile this opinion of his Lordship with the nature of the writ of *supplicavit*, for it is always sued out upon the supposition that husband and wife are to cohabit,<sup>f</sup> as will appear from the language and the object of the writ itself, which recites, that the husband shall find sufficient bail, &c. &c. “ that he will well and honestly treat and govern the aforesaid A. (the wife,) and that he will not do, or procure to be done, any damage or ill to her of her body, otherwise than lawfully and reasonably belongs to her husband for the cause of government and chastisement of his wife.”<sup>g</sup> How then can a court of equity award a separate maintenance to a wife, upon a proceeding which she has recourse to, upon the idea that she is to live with her husband. If the husband violate the condition of his recognizance, then he forfeits to the Crown the amount for which the bail was given ; but, it is apprehended, that even the forfeiture of his recognizance gives no jurisdiction to the Court of Chancery to separate the husband from the wife, and to give her an allowance out of his property. For the husband’s property must have been the fund out of which his Lordship proposed to make the settlement, as, if the wife had a trust property in Court, and had been ill treated, then the *supplicavit* would not have been wanted to afford the Court the means of giving her subsistence. It seems, too, that at common law, although a separate maintenance cannot be adjudged to a woman on account of her husband’s ill treatment of her, yet, if he will not maintain her, it is considered to be a breach of the peace by him ; and if articles of the peace be exhibited against him by her, and he enters into a recognizance to keep the peace with her,

<sup>e</sup> Ball v. Montgomery, 2 Ves. jun. 195.

<sup>f</sup> Head v. Head, 3 Atk. 550.  
<sup>1</sup> Ves. sen. 17.

<sup>g</sup> Fitz. N. B. 238. F.

it would be a forfeiture of the recognizance, if he did not maintain her.<sup>h</sup> So that, in this way, a court of law may incidentally enforce a maintenance, though not a separate one, to a married woman, where she is insufficiently provided for by her husband, for, in such a case, she may bind him to the peace, and then he must maintain her, or else forfeit his recognizance. But this is an expedient that must have been seldom, if ever, resorted to, as there is no precedent of such a proceeding to be met with in the books.

The preceding equities are administered to the wife always in the lifetime of her husband; she has another equity, arising from her property, which is never called into action until after his decease, and which is produced by a transaction of this nature; namely, if the wife have pledged her real estate, or have surrendered her own interest in her husband's real estate for the purpose of paying his debts, or of otherwise forwarding his views, or if she have advanced her separate money for the same object, a court of equity will take care to see her reimbursed out of her husband's property, if any shall remain after his creditors have been satisfied.<sup>i</sup>

Equity administered to a married woman after her husband's decease.

All these equities belong to the wife, and are administered to her only. But the husband also has his equity, attaching to and produced by the wife's property; for, if a woman, before her marriage, and in contemplation of it, do any act relating to her property, for her own benefit, which abridges the marital rights, this Court will treat the transaction as fraudulent and void, and place the husband in the unrestricted enjoyment of the interest of which she intended to deprive him. However, if she have made such disposition of her property not for her own use, but in the discharge of a *bonâ fide* debt, or in the performance of a moral obligation, such as in making a provision for her children by a former husband, the purity of the motive will give validity to the act, and protect it from the legal claims of the husband.<sup>j</sup>

Equity of the husband to be relieved against settlement by wife before marriage.

<sup>h</sup> See the judgment of Lord Chancellor King in *Colmer v. Colmer*, *Mos.* 120.

<sup>i</sup> See Chap. XII. Book V.

<sup>j</sup> See Chap. XIII. Book V.

## CHAP. II.

OF THE WIFE'S EQUITY, AS IT IS ADMINISTERED TO HER  
AGAINST HER HUSBAND.

"Wife's  
equity" a  
rule of  
long stand-  
ing.

THE equity of securing a provision to a married woman out of her unsettled fortune, has been for a long period administered to her against the husband himself, as an instance in which it was applied is to be found in one of the earliest Chancery reports ; that is in *Tothill*, in the case of *Tanfield v. Davenport*,<sup>a</sup> where the husband had sued in the Ecclesiastical Court, and Lord Keeper Coventry ordered an injunction to stay the proceedings, till he should make a competent jointure. So also this equity of the wife, as against the husband, was recognized in *Micoe v. Powell*,<sup>b</sup> although the facts of the case did not call on the Court to act upon it. There Micoe filed his bill against Powell and his wife, and the trustees of her estate, in which it was stated that the plaintiff's daughter was seised of an estate in lands to the value of 400*l. per annum* ; that the defendant Powell had obtained her clandestinely without the plaintiff's consent, and had made no provision for her, or settlement on her or her children ; and that plaintiff was informed that the defendant, Powell, intended to make his wife, (who was an infant,) as soon as she should come of age, to sell her lands and levy a fine of them ; and forasmuch as the estate in law of the said lands was vested in trustees, who could not be compelled to transfer their estate, but in this Court, but threatened to do it voluntarily, unless prohibited by order of this Court ; therefore, out of the fatherly care of his said daughter, and to the intent that a provision and settlement be made for her, and that he might be relieved in all and singular the premises, he prays process

<sup>a</sup> *Tothill*, 114.

<sup>b</sup> 1 *Vern.* 40.

against husband and wife, her two trustees, &c. &c. There was a demurrer to this bill, for want of interest in the plaintiff, which was allowed; but his Lordship said, that "If Mr. Powell had been plaintiff here in Chancery to have the trustees transfer their estate, or for any other favour of the Court, then, indeed, when he had such a hand upon Mr. Powell, he could make him do such things as should be reasonable."

In this case of *Micoe v. Powell*, there is no decision on the wife's right to a provision out of her fortune; there is merely an intimation of the Court as to the relief to which the wife would be entitled under certain circumstances, without any question being raised upon the subject; but the strength of this equity was afterwards fully tried, and its superiority over the legal claims of the husband amply established, in the subsequent case of *Milner v. Colmer*;° and, though it would seem, from the two former cases, that the wife's equity had been long and firmly settled as the fixed practice of the Court, we find, in this case, that the husband's legal rights were as warmly defended, and this doctrine as strongly combated, as if it had been a novel encroachment. Even his Lordship (Lord Chancellor King) expressed much disapprobation of the rule; and although an order was made on the husband to make proposals for a settlement on his wife, before he was suffered to receive her portion, yet it was made with great reluctance by the Court. In this case, the defendant, Colmer, had married a minor, without the consent of her mother, or of the Court, during the pendency of a bill for an account of the personal estate of the minor's late father, in which there was a decree that one third should go to the widow, according to the custom, and the remaining two thirds to the children. Mrs. Colmer's share amounted to 14,000/., and her husband having applied to the Court for this money, he was sent to the Master to make proposals as to the settlement which he was willing to make on his wife. When his proposal came

Wife's equity reluctantly enforced by Lord King.

to be considered, on the Master's report, his counsel argued, that this money being personal estate, the law vested the right to it in the husband, and that it was extraordinary that a court of equity should intermeddle where the law gives a plain title. It was replied, on the other hand, that if the husband could get his wife's portion at law without the assistance of equity, then the Court would not, in such case, interpose; but the application being in a court of equity, by the husband, for his wife's fortune in the hands of the Court, if he will have equity, he must do equity; and the Chancellor said, he thought it extraordinary that this Court should interfere in cases where the law gives him a title to the wife's personal estate. However, it appears, from the register's book, that Colmer, the defendant, was obliged to make a settlement on his wife.

The court will enforce a provision for the wife out of her equitable interests, and if any part of them have been vested in the husband, it will not interfere.

*Adams v. Pierce*<sup>d</sup> is a case in which the Court not only recognised the wife's equity to a provision out of her personal fortune, which was within the power of the Court, but also refused to interfere with a part of her portion, which had been of an equitable nature, being a legacy, the husband having got it into his possession by the assent of the executor. In this case, one Adams had bequeathed about 2000*l.* to each of his two daughters, and several leasehold estates to his son, and if the son should die within age, then to go to his daughters; and he made his brother his executor. The eldest daughter married the defendant, Doctor Pierce, who made a settlement upon her. The second daughter married a freeman of London, who consented, before the marriage, that the executor should assign part of her portion to trustees for her separate use. The son entered upon the leasehold premises with the assent of the executor, and died during his infancy, by which an estate worth 4000*l.* devolved upon his two sisters. The executor in trust filed this bill to pass his accounts, and also prayed, that the two husbands should, in consideration of this increase of their wives' portions, make additional



settlements. The Chancellor (Lord Macclesfield) said, "The executor having assented to the legacy of the leasehold estates to the son, this is an assent also to the devise over to the daughters, who have thereby gained a legal interest in such leasehold estates, which I cannot take from them, nor divest them of what is already vested in them by act of law ; but as to that part of the estate which consisted of money, the executor being but a trustee thereof for the wives, the Court can choose, whether they will let the husbands have the money without making a suitable settlement." But as the money, exclusive of the leasehold estates, was inconsiderable, and as the husbands were prosperous in their circumstances, his Lordship said, that it was not worth while to settle that. The decree was, that the executor should account and have his costs to this time, reserving all subsequent costs. Now this case proves two propositions ; first, that the wife is entitled to a settlement out of her equitable portion, if she has been already inadequately provided for ; and, secondly, that if the husband have got the possession of any part of that portion, without making a settlement upon his wife for it, the Court will not disturb him in the enjoyment of it.

*Brown and Wife v. Elton*,<sup>e</sup> is another case in which this protection was afforded to the wife against her husband, but it differs from the preceding in this particular, that in this latter instance, the wife joined her husband in an application to the Court against an executor for a legacy which had been bequeathed to her. There Sir John Brown had married a lady to whom a legacy of 400*l.* had been left, payable at her marriage. Sir John demanded the legacy, but the executors refused, unless some provision were made for the wife. Husband and wife filed their bill against the executor for the legacy, and on the hearing before the Rolls, it was decreed, that the husband should make his proposals for a settlement to the Master, and should pay all the costs. From this decree there was an appeal, which

Provision  
decreed to  
wife out of  
legacy,  
where she  
and her  
husband  
had filed a  
bill against  
the execu-  
tor for it.

was heard before Lord Chancellor King; for the plaintiffs it was contended, that this being a legacy out of personal estate only, the plaintiffs might have recovered it in the spiritual court, without being put under any terms; besides, as the husband might release this legacy, to impose terms on him was to take from him the benefit of the law. The defendant's counsel, on the other hand, said, that as the plaintiff sought equity, he must do it; that it was the constant practice of the Court, and nothing unreasonable in it, when the husband came for assistance in recovering his wife's portion, to give their assistance on whatever terms they deemed reasonable. His Lordship said, "I have found it to be the constant practice at my coming into this Court, to enforce the husband, before he recovers by the aid of equity his wife's portion, to make a settlement; and as such practice has so long obtained, I shall not at this time take upon me to alter it, although it seems to break in upon the legal title which the husband has to his wife's personal estate." His Lordship then affirmed that part of the decree which directed a settlement, but reversed that part of it which gave the costs against Sir John.

Action for legacy not maintainable, because husband would then be able to recover it without making a provision for his wife.

In this case, Lord Chancellor King manifested the same feeling against the wife's equity that he did in *Milner v. Colmer*,<sup>g</sup> on account of its interference with the legal rights of the husband; but he yielded, notwithstanding the inconvenience it sometimes produced, because, as his Lordship expressed himself, "custom and long usage had sufficiently established it." His Lordship also decided by this case, that a legacy was liable to this equity, although at that time an action at law might have been maintained against the executor for the recovery of it.<sup>h</sup> Now, indeed, such an action does not lie;<sup>i</sup> and one of the reasons given for it is, that the husband would by such means get a legacy bequeathed to his wife free from the condition which a court of equity imposes; and as an injunction would issue for the same reason against a husband proceeding in the ecclesias-

<sup>g</sup> 2 P. Wms. 639.

<sup>h</sup> Blount v. Bestland, 5 Ves. 517.

<sup>i</sup> Deeks v. Strut, 5 T. R. 690.

tical court for his wife's legacy, there is, therefore, no longer any question as to the liability of this part of her portion to this claim.<sup>j</sup> However, the Court went a much greater length in support of this claim of the wife, in the subsequent case of *Bond v. Simmons*;<sup>k</sup> for there, on the bill of the husband against the executor, for a legacy of 500*l.* left to his wife, it appearing that he had already had at least 2000*l.* of her fortune, and that he had never made any settlement on her; and he refusing to lay proposals before the Master for a settlement in consideration of this legacy, the Court not only withheld the interest from him during his life, but on his death gave it to his widow. The facts were these: Bond, the husband, had filed a bill for this legacy, which the defendant refused to pay, because the plaintiff would not make any provision for his wife. The Court referred it to the Master to receive proposals from the plaintiff for a settlement, and the Master reported, that no proposals had been laid before him. The defendant then petitioned that he might be eased of the burthen of this demand, and the Court, on his offer to pay the money, directed the Accountant General to lay it out in South Sea annuities for the benefit of the plaintiff and his wife, subject to further directions. It appeared, in this case, that Bond had received at least 2000*l.* of his wife's fortune, and that he never could be prevailed upon to make any provision for her. The husband having died after this direction to the Accountant General, a question arose between his representatives and his wife, as to the dividends and produce of the South Sea annuities; and Lord Hardwicke, pronouncing his judgment, observed, "If this 500*l.* had been the only portion of his wife, I should have been of opinion, the husband, in his lifetime, would have been entitled to the interest for her maintenance; but the wife has brought him a considerable portion besides, no less than 2000*l.*, as appears by the affidavits. The husband has used her so hardly, that he has left her nothing but only her own freehold

When the husband has received a large part of his wife's fortune, and only a small part remains in court, if he refuse to make a provision, neither principle nor interest will be given to him.

<sup>j</sup> *Tothill*, 114. <sup>1</sup> *Strange*, 238. 503. <sup>k</sup> 3 *Atk.* 20.  
<sup>1</sup> *Ves. jun.* 182. <sup>5</sup> *Ves.* 517.

estate, which he could not debar her of: he has been so obstinate, that he would not perform the terms of the decree by making a settlement; so that, upon application to the Court, they ordered the money to be put out by the trustees for the benefit of the husband and wife, subject to the further order of the Court, without saying any thing of the application of this money. Where a husband has received a great part of his wife's portion, and only a small part remains, and the husband is so perverse he will not make a competent settlement on the wife, the Court will not only stop the payment of the residue of her fortune to her husband, but will even prevent his receiving the interest of that residue, that it may accumulate for the benefit of the wife, unless he is starving for want of maintenance. The direction here was not for the benefit of the husband, or to alter the right and property of the parties, but only to ease the executor of the burthen, and ordering the Accountant General to lay it out in this manner, was to secure it against the husband, subject to the further order of the Court." His Lordship then directed, that so much of the order as directs the produce of the South Sea annuities to be paid to John Bond, (the husband,) should be discharged, and that the same should be paid to the petitioner.

And certainly this was acting up to the true spirit of the rule of equity, which endeavours to secure to a wife, unprovided for by settlement, a fair proportion of her fortune. The general rule is, that a husband, maintaining his wife, is entitled to the interest of her fortune, though he should refuse to make a settlement on her; but in this case Lord Hardwicke has introduced a wholesome exception to it, namely, that where the husband has already received a large share of her fortune, not having made any provision for her, and applies to the court for another part of it, he shall not have even the interest of this unrecovered portion, until he complies with the terms of the Court. And by this means it appears, that the wife may have not only the principal of her legacy by survivorship, but the interest of it also. Indeed, this case suggests a mode of administering

the wife's equity, which, if adopted, would add greatly to the security of women who marry without the precaution of a previous settlement, namely, that the wife's provision should be proportioned not merely to that part of her equitable portion which the husband seeks to reduce into possession, but to the entire of her fortune, whether legal or equitable, and including as well that part of it which he had previously received without making a settlement upon her, as that part of it for the recovery of which he sues in equity. In this way the Court would be enabled, on many occasions, to secure an adequate provision for a married woman out of her entire portion, without infringing upon the present rule, not to interfere with that part of her property which the husband may have independently of the aid of a court of equity.

These are the principal cases in which equity has interfered for the protection of the wife against the husband himself. There are, no doubt, several others of the same description, but it is deemed sufficient for the present to advert to them briefly, the more particularly, as they will require to be more fully stated and observed upon hereafter with a view to other divisions of this subject.

*Harrison v. Buckle*,<sup>l</sup> and *Gardiner v. Walker*,<sup>m</sup> were cases where bills were filed by executors for injunctions against husbands who were proceeding in the ecclesiastical court for the recovery of legacies which had been left to their wives, and the injunctions were granted, until provision should be made for the wives. *Winch v. Page*<sup>n</sup> was a case of an unusual nature; it was that of a bill for an injunction by a father against his son-in-law, who had brought an action on a bond which had been executed by the father to his daughter for the payment of a sum of money, as her portion. The bond had been deposited in the hands of a trustee, previous to the marriage of the daughter; she afterwards marries without her father's consent, and the trustee delivers the bond to her husband, who brought an action

Injunction will be granted at the suit of executor against husband proceeding for recovery of wife's legacy, until he makes provision for her.

Injunction will be granted at the suit of obligor of bond

against husband suing for the amount, until he makes a provision for her.

Provision will be decreed at suit of wife out of accession of fortune, notwithstanding a previous settlement.

Injunction granted at suit of wife against husband assigning her equitable interests, until a provision made for her.

upon it. The bill prayed that the husband should be restrained from proceeding, and that the Court should secure the money for the plaintiff's daughter, the defendant's wife, and the injunction was granted. In *March v. Head*,<sup>o</sup> and *Tomkyns v. Ladbroke*,<sup>p</sup> and in an anonymous case in 2 Ves. sen.,<sup>q</sup> the husbands were obliged to make provisions for their wives on an accession of fortune to them; and in the first two instances it was held, that the wife was entitled to a provision in consequence of such accession, although there had been a previous settlement upon her. In the case also of *Lady Elibank v. Montolieu*,<sup>r</sup> the same care was taken of the plaintiff, who filed a bill against her husband and the administrator of an intestate, (to a share of whose personal estate she was entitled as one of the next of kin,) praying a provision out of her share, and it was referred to the Master to see a proper settlement made on the plaintiff and her children.

There are instances also where the bills of married women, praying that their husbands may be restrained from assigning their equitable choses in action, have been entertained. In *Ellis v. Ellis*,<sup>s</sup> the plaintiff, a married woman, filed a bill to restrain her husband from assigning money in the funds, to which she was entitled, and to compel him to make a settlement. And Lord Loughborough continued the injunction, and directed the husband to lay proposals before the Master. And in *Roberts v. Roberts*,<sup>t</sup> on a similar application, Lord Alvanley granted similar relief. At the time, however, at which these last two cases were decided, the nature and extent of the wife's equity was not so fully understood as it is at present; but since the doctrine, that the wife's equity is a lien on her equitable choses in action, even in the hands of a purchaser for valuable consideration, has been established, such bills have become unnecessary.

o 3 Atk. 720.  
p 2 Ves. sen. 591.  
q 2 Ves. sen. 671.  
r 5 Ves. 737.

s 1 Viner's Sup. 476.  
t 1 Viner's Sup. 476. 2 Cox's  
Rep. 422.

And this equity will be administered to the wife, not only at her own instance and that of her trustees, and of the executors of a testator who had bequeathed a legacy to her, but even the debtor of the wife has been allowed to resist the payment of the debt to the husband, and to claim the benefit of this protection for her in respect of it. For in the case of *Davy and Wife v. Pollard*,<sup>u</sup> where the plaintiff and his wife, who was the daughter and executrix of Thomas Day, filed their bill, by which they demanded 200*l.* from the defendant, Sarah Pollard, for which she had executed her bond to the testator, the plaintiff Elizabeth's father. The defendant admitted the execution of the bond, but said, that she had made a payment of 50*l.* on account of it, on which the bond had been delivered up to her to be cancelled, and that the remaining 150*l.* was lent upon a mortgage of a house, and was well secured, and ready to be paid with interest, as the Court should direct, so as the same may be preserved for the benefit of the plaintiff Elizabeth, and not to be spent by her husband. And this appearing to be the case, the Court declared, that since George Davy, the husband, had not, nor would make any provision or settlement on his wife, the aforesaid 150*l.* so secured by the said mortgage of the said house, should continue and remain on the security until the same should be laid out or otherwise secured for the wife, or till the Court should make further order therein.

Wife's equity administered at the instance of her debtor.

These are the cases in which the husband himself has been obliged to submit to this rule of the Court in favour of the wife. But if husband and wife are residents in a foreign state, where the laws are such that they would defeat any provision made in this country for her, it seems that the Court will let the husband have her money without putting any terms on him. As in *Sawer v. Shute*,<sup>v</sup> where the husband came into court to obtain money found by the report of the Deputy Remembrancer to be due to his wife upon the distribution of an intestate's effects, the Court took

Where husband and wife are residents of a foreign country, the law of which would give the entire of wife's fortune to the husband, the wife's equity will not be enforced here.

<sup>u</sup> Finch's Ch. Rep. 377. 1 Eq. Abr. 64.

<sup>v</sup> 1 Anst. 63.

into consideration whether they should order the money recovered to be settled on the wife, or given to the husband. The Master, on a reference to him, certified, that by the laws of Prussia, of which husband and wife were inhabitants, the whole personalty of the husband and wife was, during the coverture, at the absolute disposal of the husband, but, on the death of either, was divided between the survivor and the heirs of the deceased. And the Court observing that it would be very difficult to direct any way by which it could be settled, so as not to be liable to be done away by the laws of Prussia, ordered it to be paid to the husband.

Wife's  
equity ex-  
tended to  
her legal  
choses in  
action.  
Quære.

It appears, however, that this equity of the wife was received in the Court of Chancery with some symptoms of disapprobation, as Lord Chancellor King thought it "extraordinary that equity should interfere against the husband in cases where the law gives him a clear title to the wife's personal estate,"<sup>w</sup> and that "it seemed to break in on the legal title, which the husband has to his wife's personal estate."<sup>x</sup> But Lord Hardwicke was of a different opinion, for he considered this rule as founded in justice,<sup>y</sup> and so far from agreeing with Lord Chancellor King, his Lordship would give neither principal nor interest of the wife's fortune to a husband persevering in his resistance to make a provision for her.<sup>z</sup> Indeed in *Jewson v. Moulson*,<sup>a</sup> his Lordship intimated an opinion, that this equity ought to be extended even to the legal choses in action of the wife, which, although there have been only three decisions to countenance it, and although the prevalent spirit of the cases be against it, yet seems perfectly reconcilable with the principle that actuates courts of equity in their interference on these subjects. The opinion is this, that where there is a bond debt to a wife, *dum sola*, and the husband recovers it at law, if a bill be brought for an injunction to stay execution upon the judgment at law, it would

w 2 P. Wms. 639.  
x 3 P. Wms. 202.  
y 2 Atk. 420.

z 3 Atk. 20.  
a 2 Atk. 420.



be granted. His Lordship does not expressly say, that the injunction would be granted under such circumstances, but after putting such a case, his words are, "I do not know whether this Court would not grant the injunction, but as this point is not now before me; I will not determine it."

The cases alluded to above as corroborating this notion of his Lordship, are *Mason v. Masters*,<sup>b</sup> and *Winch v. Page*,<sup>c</sup> and decided, the first upwards of sixty years, and the second twenty years before the case of *Jewson v. Moulson*.<sup>d</sup> In *Mason v. Masters*, which was decided by Lord Nottingham, the defendant stole a marriage with one that had 500*l.*; half was paid down, half was secured by bond. The defendant sued the bond, and Lord Nottingham said, "I restrained this suit till some provision was made for the wife out of the money, and at the same time dismissed a bill brought by a creditor of the husband against the trustee of this bond to pay him out of this security, which was a kind of attachment in equity." This decision is entitled to great respect, not only as coming from Lord Nottingham, but also because it was cited in strong terms of approbation by Lord Northington, in *Forbes v. Phipps*,<sup>e</sup> where his Lordship, having stated the principles established by *Mason v. Masters*, said, "And I am warranted by the highest authority in saying this, viz. the case of *Mason v. Masters*, determined 30 Car. 2. by Lord Nottingham." So, in *Winch v. Page*, the facts of which have been fully stated above,<sup>f</sup> a father gave a bond to his daughter for the payment of a sum of money, and, upon her subsequent marriage without his consent, the husband having proceeded for the recovery of the money, an injunction was granted, on the father's bill, praying, that it be secured for the benefit of his daughter and her children.

Husband restrained from recovering wife's bond at law until provision made for her.

<sup>b</sup> Cited by Lord Northington in *Forbes v. Phipps*, 1 Eden's Cas. 506.

<sup>c</sup> Bunb. 87.

<sup>d</sup> 2 Atk. 420.

<sup>e</sup> 1 Eden's Cas. 506.

<sup>f</sup> Page 463.

Upon this case the reporter observes, that this was going a great length, and, as he believed, beyond what had been done in Chancery: for, says he, "the obligee is defendant here." So that Bunbury's objection to this decision was, not because he thought that equity ought not to interfere with any claim of the husband to his wife's portion, which he could establish in a court of law, but because it was unusual to put terms upon him, unless where *he himself* comes into a court of equity for his wife's portion.

Ought  
wife's  
equity to  
be confined  
to her  
equitable  
property?  
Quere.

Now, considering these decisions coupled with the opinion glanced at by Lord Hardwicke, and looking at the motives which guide courts of equity in affording this protection to married women, it is hoped it will not be deemed too bold or extravagant a position to contend for, that the same jurisdiction should restrain the husband from availing himself of any means, either at law or in equity, of possessing himself of the wife's legal choses in action, without making a competent provision for her.<sup>g</sup> The rule of equity with respect to the wife's portion is, that the husband shall not have the aid of the Court to acquire the possession of it, unless he make some settlement on her; and the reason assigned for this interference is, because it would be a hardship and an injustice, to leave a woman who has brought a fortune, to the chance of a husband's unkindness or insolvency. Such benevolent precaution is properly within the province of an equitable jurisdiction. But is there any good reason for limiting the exercise of that benevolence to the equitable interests of the wife, and for leaving her legal choses in action to the mercy of her husband? Can any good reason be assigned, that a court of equity should force a husband to make a provision for his wife out of her personal fortune, which happens to be of an equitable description, while he is at the same time suffered to possess himself of all her legal interests, unmolested by the same Court? It is very true, that the law vests the personal property of the wife in the husband, but

<sup>g</sup> See, on this subject, Hargrave's note to Co. Litt. 351 a. note 304.

this is no reason for suffering the husband to take his wife's legal choses in action without imposing terms on him, while this equity for a provision attaches on those which are equitable, for the law vests the one kind of property quite as much in the husband as the other. The legal rights of the husband are as much interrupted and infringed upon by the interference of equity with the equitable interests of his wife, as they could be by any interference with those which are purely legal. So that the reasonableness of this exemption of the wife's legal choses in action from the wife's equity, is not at all established or advanced by the maxim that all her personalty vests in her husband. So long, indeed, as the courts of equity interposed for the wife, only where the husband required their aid, there was some ground for refusing to interrupt him in his efforts at law to possess himself of her fortune, because, as in such cases, he sought no equity, there was no necessity for requiring him to do equity. But at the present day, when the wife's interests are protected, and her equity dispensed to her, whoever the plaintiff may be, whether the husband or his assignees, who ask for assistance with respect to her personal fortune, or the wife or her trustees, who pray the benefit of this equity for her, surely there can be no pretence for not subjecting her legal choses in action and her equitable property to the same rule.

If there were no instance in which a court of equity interrupted the enjoyment of a clear legal right, with a view to the prevention of a possible mischief, then indeed the argument against the interference of equity with the legal choses in action of the wife would derive some strength from the absence of such an example; but, when we recollect that a court of equity will enjoin a tenant for life without impeachment of waste,<sup>h</sup> not to do acts which may injure the inheritance, what becomes of the argument against an injunction to prevent a husband from recovering his wife's

<sup>h</sup> Wyatt's Regis. 243. Mitford's Pleadings, 3d edit. 113.

personal fortune, merely because the law gives such property to him; the law as fully gives the tenant for life, without impeachment of waste, the power of cutting down trees, and the property in them when they are cut down,<sup>i</sup> as it gives the goods and chattels of the wife to her husband; and yet a court of equity has no scruple in issuing an injunction against such a tenant for life, who attempts to exercise his legal rights by the destruction of ornamental timber,<sup>j</sup> or by doing any other act which may occasion permanent injury to the inheritance.

If the prevention of a mischief which may be permanent and irreparable be an object with a court of equity sufficient to rouse it to interrupt the assertion of a clear legal right, what case can be conceived more calculated to produce this effect, than that of a husband seizing upon the property of his wife without securing any provision for her, and affording her no protection against the possibility of his future misfortunes, or of his future waste and improvidence. Can a court which exercises a power to preserve timber, merely because it is ornamental, in opposition to a person having a right at law to destroy it, be said to be without jurisdiction to prevent a cruel waste on the property of a woman, who may be left destitute by a rigid adherence to a legal maxim.

But it has been urged as an argument against the interference of equity with a husband's possession of his wife's legal choses in action, that he having a right to release them, it would be in his power at any time to defeat the care and precaution of the court by the exercise of this right. The answer to this argument is, that the husband would be very unlikely to strip himself of the benefits of his wife's property, without receiving some compensation for it, and that merely to avoid making a settlement on her; and that, though he has such power, yet it could be no reason

<sup>i</sup> 1 T. R. 56. Co. Lit. 220 a.      <sup>j</sup> 1 Vern. 24. 2 Vern. 738.

with a court of equity for declining to secure such property of his wife, when her husband attempted to reduce it into possession. For a husband may release his wife's legacy; and yet it is the constant practice of that court to issue an injunction to restrain him from proceeding to recover it in the ecclesiastical court.<sup>k</sup> So that the husband's power over his wife's legal choses in action, can be no reason for the refusal of the Court to prevent his reducing them into possession.

At one time, it was the practice to refuse to administer the wife's equity, unless the husband, or some person claiming through him, applied for the aid of the Court, to acquire the possession of the wife's equitable interests. But, if the wife were the plaintiff, praying for a provision out of the same property, her bill would be dismissed,<sup>l</sup> a distinction that can hardly be reconciled with any of those principles which usually regulate courts of justice in their decisions. For, if we look to the only ground on which a court of equity can justify its interference with the legal claims of the husband to the personal property of his wife, namely, an anxiety to prevent the injury and injustice which must arise to her, if, being entitled to a sum of money, and having no adequate provision, she should be left destitute of any means of support, it is difficult to discover a good reason for saying, that, if a married woman, under such circumstances, be plaintiff, and seek the assistance of the Court, she shall not have it, although it be manifest that she has been hardly used; and yet that, if she be defendant, and the husband, or any person appearing in his right, and calling on the Court to assist in the reduction of her property into possession, be plaintiff, then, and in such a case only, the Court will interfere for her; as if claims to justice and protection were rendered weaker, be-

Formerly wife's equity not administered, if she were plaintiff.

<sup>k</sup> Tothill, 114. 1 Strange, 238. 238. Gardiner v. Walker, 1 Strange, 503. Prec. Chan. 548. 5 Ves. 503. Winch v. Page, Bun. 87. Eli-  
bank v. Montolieu, 5 Ves. 737. Carr  
517. 939.

<sup>l</sup> Bosvil v. Brander, 1 P. Wms. v. Taylor, 10 Ves. 574.  
458. Harrison v. Buckle, 1 Strange,

Wife entitled to the benefit of the "wife's equity," whoever the plaintiff may be.

If executors be plaintiffs against husband seeking to reduce wife's legacy into possession, she shall have her equity.

cause it was the person injured who sought redress. However, redress to the wife is no longer limited to cases where the husband and his representatives are plaintiffs, for, where her property is subject to the jurisdiction of equity, whether the wife, or her trustee, or any person partaking of that character, or the husband or his representatives, or his assignees, general or particular, come for aid, still the wife is held to be equally entitled to have a provision secured to her out of it. *Tanfield v. Davenport*<sup>m</sup> is an early precedent for the interposition of equity in favour of the wife's claim, at the instance of executors, against the husband. There an injunction was granted to stay proceedings by the husband in the spiritual court for a legacy due to the wife. But, notwithstanding this precedent, equity, for many years after the decision of this case, interfered in enforcing a provision for the wife out of her fortune, only in instances where the husband himself, or some person claiming as his assignee, applied for its aid to acquire the possession of that fortune. At last, however, this rule was relaxed, and the example of *Tanfield v. Davenport*<sup>n</sup> was followed in *Harrison v. Buckle*.<sup>o</sup> In this case, A. had devised 1000*l.* to his daughter, on her arriving at age, or her day of marriage. The daughter marries the defendant, and she and her husband institute a suit in the ecclesiastical court against the trustees, who are also executors, for her legacy. The executors filed their bill in Chancery, to stop the proceedings in the spiritual court, and to compel the husband to settle the legacy on his wife. The defendant insisted on his right to the legacy independent of any settlement. The Master of the Rolls said, "The bill is of an unusual nature. It has, indeed, been the common course of this Court to oblige a husband, who comes hither in right of his wife for a sum of money, to make a proper settlement upon her, before it is given to him, and that not only in the case of trust money, which can be recovered no where else, but in the case of legacies too: though, I must say,

<sup>m</sup> Tothill, 114.

<sup>n</sup> Ibid.

<sup>o</sup> 1 Strange, 238.

I should be very cautious how I went so far as legacies, because there is a proper court elsewhere for the recovery of them. They originally belonged to the Spiritual Court only. And the sole ground of this Court intermeddling, is the discovery of the testator's personal estate. But the present case is different: the persons liable to pay the legacy are plaintiffs here, and not the husband; and whether they would not have been safe in paying the legacy, if they had suffered the Spiritual Court to go on to sentence, I will not say." His Honour then proceeded to say, "This seems to be something of the nature of an interpleading bill, wherein the executors call upon the husband and wife to interplead concerning their several rights, the husband for the money absolutely, and the wife to a proper provision to be secured for herself; and then it will be like the common case of a husband's coming into this court to have a legacy against his wife." His Honour then desired that the wife should attend, and inform the Court what provision she was willing to accept.

Here his Honour, by comparing the bill in this case to a bill of interpleader, showed his anxiety to give the wife the benefit of her equity, without directly contradicting the current of authorities. But Lord Macclesfield, in the subsequent case of *Gardiner v. Walker and Wife*,<sup>p</sup> treated the old rule of providing for the wife, only where the husband was the plaintiff, with less ceremony; for there an executor filed his bill for the direction of the Court, touching the payment of a considerable legacy left by his testator to the defendant's wife, and insisted to have the same put out for the benefit of the wife and her issue, and likewise for an injunction against the defendant's proceeding in the Spiritual Court in a suit there instituted for the legacy. The defendant insisted, that he, having commenced his suit in a proper court, ought not to be enjoined, or, if he ought, yet there could be no reason to direct the money to be put out,

p 1 *Strange*, 503.

as insisted on by the bill, it having been never done, but in cases where the husband has brought the bill to compel the executor to pay the money, and no precedent was produced where such directions had been given upon a bill brought by the trustee. His Lordship said, "Then it is time to make one. Can the difference, who is plaintiff in equity, alter the reason of the thing? If it should, it will but be for the husband, instead of coming here, to go into the Spiritual Court, (as to be sure he will,) and so get the whole into his power. There must be the usual direction, that the money may be disposed of for the benefit of the wife."

Wife's  
equity  
granted to  
her where  
she was  
plaintiff.

In several subsequent decisions, the practice has been in conformity with Lord Macclesfield's rational view of the subject; and the result of these cases seems to be, that, whenever the interests of a married woman are brought before the Court, in opposition to the claims of her husband, they will be attended to, whoever the person applying to the Court may be. In *Ex parte Coysegame*,<sup>q</sup> and *Grey v. Kentish*,<sup>r</sup> the wife applied for the protection of the Court on this subject, and obtained it: So in *Mealis v. Mealis*,<sup>s</sup> an injunction was granted at the suit of a married woman, to stay proceedings in the Ecclesiastical Court, in a cause instituted by her husband to obtain a legacy in her right without having made a settlement. *Worrall v. Marlar*<sup>t</sup> and *Bushnan v. Pell*,<sup>u</sup> *Elibank v. Montolieu*<sup>v</sup> and *Carr v. Taylor*,<sup>w</sup> are further instances where the wife's equity was administered on an application to this Court by herself. And a bill by the wife, by her next friend, claiming a provision out of her portion, will be sustained, although the husband be not joined with her as a party, but is a defendant: and such is now the proper form of

q 1 Atk. 192.

r 1 Atk. 280.

s 5 Ves. 739. in a note See also  
Prec. Chan. 548. and 1 Atk. 491.  
1 Dickens, 373.

t 1 P. Wms. 459. n. 1.

u Ibid.

v 5 Ves. 737.

w 10 Ves. 574.



the suit under such circumstances. Indeed, Lord Eldon had some difficulty, whether a married woman, by her next friend, could be a plaintiff in this Court. The difficulty, his Lordship said, "was, that it was very unusual in point of form, the bill coming on the part of the wife, instead of the husband. That, however, he did not think that objection weighed much, if the wife was entitled, and there was no way of asserting her right except by bill."

## CHAP. III.

OF THE WIFE'S EQUITY, AS IT IS ADMINISTERED TO HER  
AGAINST THE GENERAL ASSIGNEES OF HER HUSBAND.

Wife entitled to her equity against the assignees of her husband.

SUCH is the protection afforded to married women by a court of equity, against a husband claiming under the authority of the legal maxim, "That the personality of the wife, and her life interest in the rents and profits of real estate, are the property of the husband." But this protection is not confined to cases where the husband is a party immediately interested; if it were, the benevolent intention of the Court towards married women might be easily defeated, for then the husband would have nothing more to do, than to strip himself of all interest in his wife's equitable property by a transfer of it to any third person, with or without consideration, and he would thus oust the Court of its jurisdiction, and the wife of her equity. However, the Court will not suffer its provident views to be disappointed by any act of this kind, for the wife's equity is now held to attach upon her personal fortune, which is of an equitable nature, and also on her life interest in the rents and profits of real estate,<sup>a</sup> which is vested in trustees, into whatever hands they may have gone, or in whatever way they may have been transferred; whether by operation of law to general assignees, where the husband becomes bankrupt or insolvent, or by an act of the husband to general assignees for the payment of debts, or by particular transfer to an individual. And whether that particular transfer has been made for a good and valuable consideration, or was purely voluntary, is a circumstance which cannot have the slightest influence in defeating this claim

<sup>a</sup> Burdon v. Dean, 2 Ves. jun. 607.

of the wife.<sup>b</sup> Indeed, a mere life interest of the wife is not subject to this equity, and the husband may transfer it with or without consideration, so long as he is able to maintain his wife, and does maintain her; because he becomes the purchaser of it by the marriage, in consequence of this obligation to maintain the wife. But if he be bankrupt,<sup>c</sup> or insolvent, or transfer his property to assignees for payment of his debts,<sup>d</sup> or if he abandon his wife, and leave her without the means of subsistence, her life interests are as much liable to this claim as any other interest in her property.<sup>e</sup> If the husband sell a life interest of his wife, while he is able, and does maintain her, his subsequent inability to maintain her, arising from bankruptcy, or from any other cause, will not render the interest so sold liable to this equity in the hands of the purchaser.<sup>f</sup> In fact, the result of the cases will be found to be, that whatever part of the wife's equitable portion her husband is capable of disposing of without her consent, (with the exception of the trust of a term for years,<sup>g</sup>) so much, whatever may be its duration or extent, *may* be subject to a provision for her in the hands of the assignees.

By the operation of the bankrupt laws, all the property of the bankrupt, as well that to which he is entitled in right of his wife as in his own, becomes vested in the assignees under the commission; but the Court of Chancery will act towards the assignees as it would towards the husband himself, by refusing to lend its aid to them for the distribution of that part of her property which cannot be reduced into possession without the assistance of the Court, unless a sufficient provision be first made by them for her. The settlement, however, which the Court insists on for the wife, where her husband has become bankrupt, differs

Court refuses to assist assignees of bankrupt husband to get at the property of the wife, unless they make a provision for her out of it.

<sup>b</sup> See the next chapter.

<sup>c</sup> *Burdon v. Dean*, 2 Ves. jun. 607. 680. 3 Ves. 166. 4 Ves. 517.

<sup>d</sup> *Pryor v. Hill*, 4 Br. C. C. 138.

<sup>e</sup> 2 Atk. 96. 3 Atk. 20. *Mosely*, 121. 2 Ves. sen. 560. 4 Ves. 798. 11 Ves. 12.

<sup>f</sup> *Elliott v. Cordell*, 5 Mad. C. C. 149. See Sir Wm. Grant's judgment in *Wright v. Morley*, 11 Ves. 18.

<sup>g</sup> *Macaulay v. Philips*, 4 Ves. 17. *Franco v. Franco*, 4 Ves. 528.

Provision  
for wife of  
bankrupt  
is im-  
mediate.

very essentially from that which the husband himself is obliged to make when he seeks for her equitable interests; for, in the latter case, he is called on to make a provision that is to commence only from his death, whereas, in the case of bankruptcy, the assignees must make a present and immediate provision, not only out of any principal sum to which she may be entitled, but also out of her life estate.<sup>h</sup> And the reason for the difference is a very sound one; because, as the husband is deprived by his bankruptcy of the means of maintaining his wife and family, if her equity did not produce a present support, but was to vest in possession only on the death of her husband, she might starve in the interval; whereas, when he is not bankrupt, it is right to postpone her provision till his decease, if he be able and willing to maintain her during his life.

In considering the cases of bankruptcy, with reference to the present subject, it is necessary to distinguish between the applications to the Court by the assignees for the wife's property in the lifetime of the bankrupt, and those after his death, as these two different states of facts may generate two very different questions; for, during the husband's life, the only question between the assignees and his wife is, whether she is entitled to any, and what provision? but in the event of his death, after his bankruptcy, the question often arises, whether that part of her property which consists of equitable choses in action, has been reduced into possession during his life? for, if it have not, she will be entitled to so much by survivorship.

Wife entitled to a provision out of her equitable interests, when her husband becomes bankrupt, because the

When the husband becomes bankrupt, not having before that time reduced his wife's equitable interests into possession, it has been uniformly held, that she is entitled to a provision out of them from the assignees; and the principle of these decisions is this, that the assignees, standing only in the place of the bankrupt, can possess no rights over his wife's property that the husband himself had not, and that

<sup>h</sup> Elliott v. Cordell, 5 Mad. 149.

as he could not have reduced her equitable choses in action into possession without making a provision for her, neither shall they have such a right. Thus, in *Jacobson v. Williamson*,<sup>i</sup> provision was decreed to the wife of the bankrupt, before the assignees were allowed to take possession of a legacy which had been bequeathed to her. There a sum of 1000*l.* had been left by Walter Wallinger to his niece, Elizabeth Tayleur, payable after the death of the testator's wife, and at his said niece's age of twenty years, if she should so long live. The niece, without the consent of the father, married J. S., at that time much in debt, and who, shortly after the marriage, became bankrupt. The commissioners assigned all the estate and effects of the bankrupt to the plaintiffs, in trust for the creditors, and the assignees filed a bill for this legacy, the widow of the testator being dead, and the niece, the bankrupt's wife, being above twenty years of age, and the legacy consequently due. The cause was first heard before Baron Price, who decreed the legacy to the creditors. There was an appeal from this decree to the Lord Chancellor Cowper, when his Lordship declared, that forasmuch as the plaintiffs, the assignees in the commission, claimed under the bankrupt, they ought not to be in a better case than the bankrupt himself; and since, if he had brought a bill for this legacy, the Court would not have allowed it to him without obliging him to make some provision for his wife and children; so, for the same reason, when those, claiming under the bankrupt, and who must be exactly in the same case as he himself would have been in, came for equity, they ought to do equity, which would be to provide for the wife and children of the bankrupt, from whom they derived their claim. His Lordship then decreed the interest of the money to the assignees, as the bankrupt commonly was allowed to receive that, so the assignees ought to receive the same during the bankrupt's life; and as, if the bankrupt's wife should die without issue, then the bankrupt

assignees  
stand in  
his place.

would have been allowed to receive the whole money ; in such a case, the assignees should be allowed to receive it also. But on a subsequent day, it having been made appear to the Court that the bankrupt had obtained his certificate, and was discharged before the legacy was due, the bill was dismissed without costs, on the ground that the assignees could not assign this possibility of right which the bankrupt had to the legacy. In the following year the wife of J. S. filed a bill by her next friend, stating her being seduced into this marriage, and the husband's bankruptcy, together with the certificate for his discharge, and prayed that the money might be put out for her separate use for life, and afterwards for her children, to which the husband submitted by his answer, only asking for the arrears of interest. The assignees opposed the bill, insisting that the commissioners might still make a new assignment of the legacy, which was now, though not before, vested ; but Lord Chancellor Parker said, "The commissioners have executed their power, and the debts which the bankrupt owed before his bankruptcy, are now extinct by act of parliament, and this portion is a newly acquired estate by the husband in right of his wife, wherefore decree the husband the arrears of interest, deducting the costs, and let the legacy be laid out in a purchase ; and in the mean time let the wife have the interest for her separate use ;" by which means, as the reporter observes, the whole legacy was saved to the wife and children. But it is apprehended, that at the present day it would be held that this contingent interest of the wife passed by the assignment, subject to the wife's equity for a provision, as it is now clearly established, that the possibilities of the bankrupt, or those to which he is entitled in right of his wife, are assignable under the commission.<sup>j</sup>

It appears in this last case, that Lord Chancellor Cowper considered the wife entitled to a provision only from the death of the husband, and that in the mean time the as-

<sup>j</sup> See the cases on this subject, collected in Montague's Bankrupt Laws, 195.

signees should receive the interest. However, the relief which is now afforded to the wife of a bankrupt out of her own equitable portion, is much better suited to the pressing nature of her wants, as, by the modern practice of the Court, it is a present maintenance. In *Watson v. Mascal*,<sup>k</sup> where a bill was filed by the assignees of a bankrupt against him and his wife, praying to have the share of an intestate's effects, to which the wife had become entitled since the bankruptcy, paid to them as assignees under the husband's commission, the Court directed that her share should be vested in trustees to be allowed by the Master, and that the interest thereof should be paid to Sarah Mascal, (the wife,) for her life, for her separate use, and after her death, to be paid to the assignees, to be divided amongst the creditors under the said commission. So, in *Wenman v. Mason*,<sup>l</sup> which was decided by Lord Northington, where the wife being entitled to the third part of the produce of a real estate, which was devised to trustees to sell, she and her husband joined in an assignment of this legacy to one Humfrey, as a security for the sum of 300*l.* for which Humfrey had joined the husband in a bond: the husband afterwards became a bankrupt, and the bill was filed by Humfrey, the particular assignee, who had been obliged to pay the amount of the bond, against the general assignees under the commission, and against the husband and his wife, and other persons, praying to have the share of the wife paid to the plaintiffs, in discharge of their debt, and the remainder to be paid to such of the defendants as should appear to be entitled thereto. The Court directed that 300*l.* of the legacy should be applied for the benefit of the wife and her children, the interest to be paid to her for her separate use for her life, and that on her death, her children, or such other persons as should be entitled thereto, should be at liberty to apply to the Court for directions touching the transfer of the same. Now it is to be observed of these two immediately preceding cases, that in both of

Provision  
for wife of  
bankrupt  
directed to  
be for her  
life, for her  
separate  
use.

<sup>k</sup> 1 P. Wms. 458, note 1.

<sup>l</sup> Ibid.

them the provision was for the wife's separate use for life ; but that in the first of them there was nothing given to the children ; on the contrary, the whole share of the wife was to be paid to the assignees.

Provision  
to wife of  
bankrupt  
out of her  
equitable  
property,  
not barred  
by a settle-  
ment on  
her mar-  
riage.

*Burdon v. Dean*<sup>m</sup> is the next instance in which the Court refused to assist the assignees of a bankrupt husband, until they made a provision for his wife. In this case, the bankrupt was living, and the provision secured for his wife was immediate. The facts were these : William Walker by his will gave 1000*l.* in trust to be paid for the marriage portion of his daughter Sarah, if she should marry with the approbation of the trustees. He also gave, after the death or marriage of his widow, all his freehold estates in moieties to the use of his two daughters, Sarah and Elizabeth, for life, with remainder to their children ; and all his leaseholds, and the residue of his personal estate, in trust, as to one moiety to pay the rents and profits, interest and produce to Sarah for life, and after her decease, in trust for her children equally, with a similar trust as to the other moiety for his other daughter Elizabeth. Sarah married William Blastock, and by settlement previous to the marriage, to which the trustees for the 1000*l.* were parties, it was agreed, that in consideration of the marriage, and of 500*l.* part of that sum, paid to the said William Blastock, the remaining sum of 500*l.* should remain in the hands of the trustees upon trust, to permit the interest to be received for her separate use, not subject to the debts or control of her husband. (No notice was taken of the other property of Sarah Walker.) The widow of William Walker died shortly after, from which time William Blastock, who married Sarah, and Richard Eaton, who married Elizabeth, received the rents, dividends, and interest of all the property of William Walker, to the amount of 500*l.* *per annum*. In 1794, William Blastock was declared a bankrupt, and his assignees filed a bill, praying to be declared entitled, during the joint lives of the bankrupt and his wife, to the income



of a moiety of the testator's freehold, leasehold, and personal estate, and to such estate and interest as the bankrupt was entitled to in right of his wife, as tenant by the curtesy or otherwise, under her father's settlement, and the income thereof, and an account of the arrears. The bankrupt and his wife, by their answer, stating, that they had four children living, claimed some further provision for the wife. The Master of the Rolls said, "It is impossible to give her the whole, for that would be to admit that a married woman is entitled to the whole of her property to her separate use. Courts of equity have gone thus far as to all personal property of the wife, which the husband is not authorized by law to reduce into possession, but must come here for: he must either show himself a purchaser, or make some provision for her out of it; otherwise the Court will not give it to him. I do not know that the Court will give it to the wife. I doubt whether that has been extended to a trust of a real estate, to which the wife is entitled for life." His Honour then expressed a doubt whether the wife, having before marriage stipulated for a certain portion of her fortune, had ever been permitted to come into equity to require more. But his Honour admitted, that a new equity arose upon property newly acquired; however, on the next day, he said, "I am of opinion that the settlement has not barred the wife. The next question is, whether the plaintiffs can get at any thing without the intervention of this Court? I have no objection to what they can get at law; but if they come into this Court, I will not extend the arm of the Court to give them any other part of her property without a consideration for it: therefore, let it be referred to the Master, that they may lay proposals before him."

Wife of bankrupt entitled to a provision out of her trust of a real estate for her life.

Here Lord Alvanley seemed to have felt a doubt, whether the equity of the wife extended to the rents of her real estate, which was vested in trustees for her during her life; but this difficulty could have been suggested to his Lordship's mind merely by the circumstance that no such case had occurred before. For, on principle, there can be no reason against subjecting the interest which the husband

Wife's equity does not attach on her estate of inheritance, when husband able to maintain her.

has in his wife's real estate, to this equity, as well as her personal property. If she had but an estate for life, then his interest in it would be in the rents and profits during his own life, if she should live so long, or, in other words, during their joint lives, and he might dispose of these rents during this period as he thought proper. In like manner, if her estate were in fee, or in tail, his interest in the rents would be only during their joint lives, and if he survived her, he might be tenant by the curtesy. And if, in either case, he should dispose of his interest, whilst he was capable of maintaining his wife, no mischief would be done. She would want no provision after his death, as the rents would be then her own; but if he should become bankrupt, and, therefore, incapable of supporting her, then, indeed, great injustice would be done to her, if his assignees could have these rents during the husband's interest in them, without being obliged to supply her with a present maintenance. So that the distinction seems to be this, that the wife has no equity to a provision out of the rents of her trust real estate, so long as her husband can maintain her; but that if he should become unable to do so, by bankruptcy or insolvency, that then her equity attaches upon all that the husband can give, and all his assignees can take during her life, namely, on the rents during the joint lives of husband and wife. But if the wife's property be personal, then she has an equity for a provision, whatever the quality of her estate in it may be, and whether her husband is capable of maintaining her or not, because he has a right to the entire of that interest, whatever it may be, and when he transfers it, there is nothing to remain for her after his death. And it was on this distinction between the different interest which the husband takes in the real and personal estate of his wife, that *Lupton and Wife v. Tempest and Others*<sup>n</sup> was decided. There, a father having devised some fee farm rents to trustees, to be conveyed to his daughters at their respective ages of twenty-one years, or marriage, the plaintiff married one of

them without the privity of her friends, and without having made a settlement upon her ; and husband and wife filed their bill to have a conveyance pursuant to the trust. The defendants confessed the will, and admitted the trust ; but submitted that the husband should be obliged to make a settlement on his wife, else that the fee farm rents should be settled on her and the children. But the Chancellor said, " Where husband and wife demand an execution of a trust of a real estate, it must be decreed according to the will, because the wife demands it. But where a husband comes for a personal demand in the right of his wife, or for raising a sum of money, there the Court may impose terms on the husband, as being in diminution of the husband's right. But here the wife is the *cestui que trust*, and demands an execution of it, and when she has it, may choose whether she will convey it to her husband or not." So that the reason for not obliging the husband to make a provision out of this estate, was, that it being real property, he could not deprive his wife of it, even after the conveyance of the legal estate to her. However, *Burdon v. Dean*,<sup>o</sup> is the only case reported, in which such a claim was made on the part of the wife, and allowed ; and it establishes this, that if the husband becomes bankrupt, his wife is entitled to a present maintenance out of the trust of a real estate, to which she was entitled for life.

*Oswell v. Probert*<sup>p</sup> is the next instance, where the assignees of a bankrupt applied to the Court in the bankrupt's life to reduce the wife's interest into possession. The question was, whether the wife of a bankrupt had a legal or an equitable interest in a sum of money ? and it was admitted, that if it were of a legal nature, it vested absolutely in the bankrupt, and that his assignees were not bound to make a provision for her on account of it. In that case, there had been a devise to the use of the bankrupt's wife, previous to her marriage, of real estate for her life, and to her issue, in strict settlement, subject to the pay-

Wife of bankrupt not entitled to a provision out of her legal interests, but out of her equitable only.

ment of the debts, legacies, and some annuities, out of the rents and profits, with a power to the trustees to sell for the discharge of the same. The devisee married one Hall, who became bankrupt, and the bill was filed by the executors of William Oswell, a creditor by mortgage of part of the real estate, and by the sisters of the testator, against the trustees. The decree directed the accounts, and all the estates were sold under it, and the produce was invested in stock. The cause coming on for further directions, the question was, whether the assignees of the bankrupt, who were defendants, must make a provision for the wife out of the interest claimed in her right, and to what extent? (One of the annuitants was living.) It was contended for the assignees, that the interest of the wife was an executed use for life, and therefore that the assignees were not bound to come into equity; on the other hand, it was argued, that the trustees were to do certain acts with the rents and profits, requiring that they should have the legal estate; that the use could not be executed in the bankrupt's wife, till these trusts were completely fulfilled; and that one of the annuitants was still living; that the fund being therefore in equity, the assignees were bound as well as the husband. The Lord Chancellor said, "There is no equity to entitle this Court to interfere upon the favour due to the wife from any person claiming by legal title from the husband; but where the persons claiming in right of the husband, however meritorious their consideration, are obliged to come into an equitable jurisdiction to obtain the benefit of any part of the property, the destination of which is for the enjoyment of the husband and wife, the Court will not apply it to the use of the husband, leaving the wife to starve." The Court was then pressed to determine the proportion of the fund which the assignee should settle; and it was said, on the part of the assignees, that in *Worral v. Marlar*<sup>a</sup> the fund was divided; but his Lordship said, "That was a sum of money; here there is no possibility of

giving the creditors any part of the principal: I cannot give the wife more than an interest for life in it. It is easy to divide a sum of money, but not easy to divide an income; for half an income is not a maintenance. Creditors are extremely handsome on these occasions: it is much better to refer it to them. I do not like to judge of it. Declare that the interest of the bank annuities belongs to the wife for life, and that a provision is to be made for her."

*Brown v. Clark*,<sup>r</sup> and *Freeman v. Parsley*,<sup>s</sup> are to the same effect, and have nothing peculiar in their facts to render a statement of them useful or necessary, being the common cases of the assignees of bankrupts claiming the unsettled equitable personalty of the bankrupts' wives, and being held liable to provisions for them in respect to such property. In *Lumb v. Milnes*,<sup>t</sup> this equity was administered to the wife of a bankrupt without controversy; the only question made by the assignees of her husband, who were plaintiffs, being, whether property to which she was entitled for life under a will was to her separate use or not? and it was held that it was not to her separate use, and that of course the assignees were entitled during her husband's interest in it; but that they should take it subject to a provision for her. In *Carr v. Taylor*,<sup>u</sup> the wife filed her bill against the assignees of her husband, who was a bankrupt, in which she prayed that her share of an intestate's personal estate, to which she was entitled as next of kin, might be secured for her benefit during her life, and for her children after her death; and she was held to be entitled to an adequate settlement out of that share, having regard to the settlement already made upon her.

In these instances it appears, that a provision only was made for the wife of a bankrupt out of her equitable interests; but there are two cases, in which the Court secured for her the benefit of the entire of such interest, against the application of the assignees of her husband. *Vandenanker v.*

Wife of bankrupt not barred of provision out of her equitable interests by previous settlement, but entitled to a provision, regard being had to settlement already made.

Instances, where en-

<sup>r</sup> 3 Ves. 166.  
<sup>s</sup> 3 Ves. 421.

<sup>t</sup> 5 Ves. 517.  
<sup>u</sup> 10 Ves. 574.

tire of  
wife's in-  
terest se-  
cured for  
her against  
assignees  
of her  
bankrupt  
husband.

*Desborough*<sup>v</sup> is the first of them. There, the testator devised 800*l.* to be paid within six months to a trustee, in trust that he should lay it out and invest it in a purchase for the benefit of the wife of J. S., and to settle it, so that after the death of the wife, it might come to her children, and the interest, in the mean time, to be paid to such person as ought to receive the profits. J. S. becomes a bankrupt, and the plaintiff, as assignee under the statute of bankrupts, would have the interest of this money decreed to him during the joint lives of baron and feme. But the Court said, that this not being any trust created by the husband, nor any thing carved out of his estate, but given by a relation of the wife's, and intended for her support and maintenance, it is not liable to the creditors of the husband; the plaintiff hath no title thereunto as assignee of the commission of bankrupts, and, therefore, decreed it should be paid to the trustee to be laid out in land, and settled according to the will. *Ex parte Coysegame*<sup>v</sup> is another instance, where the entire fund was given to the wife, and no part to the assignees. The petitioner had married Coysegame, who became bankrupt, and, at his last examination, he delivered up, with the rest of his estate, a bond which had been given to a trustee, in trust to secure the payment of 40*l.* to the petitioner, during the joint lives of her and of Sir Edward Smith. She brought a portion of 500*l.* to the bankrupt in marriage, and had nothing to subsist on but this annuity; and she prayed that the assignees might deliver the bond to her trustee, and that the arrears of the annuity, and all future payments, might be made to her. And Lord Hardwicke ordered accordingly the bond to be delivered by the assignees to the petitioner, and the arrears and future payments to be made to her separate use; his Lordship considering the creditors as standing in the place of the husband, and not entitled any more than he would have been, in case he was no bankrupt, without making a provision for her.

These two cases certainly differ from all the other decisions on the subject, as to the quantum to which the wife of a bankrupt would be entitled out of her equitable interests against her husband's assignees; however, the course of the Court seems to be now settled, that she shall have only a provision. In *Goose v. Davis*,<sup>x</sup> the Master, by his report, approved of a settlement of the whole fund on the wife of a bankrupt; and the Lord Chancellor referred it back to the Master, to be attended by the assignees. Indeed, her right to the entire of her equitable interests, on the bankruptcy of her husband, received a very full discussion in the Vice Chancellor's Court on a late occasion. For in *Beresford v. Hobson*,<sup>y</sup> where the Master, on a reference to him to receive proposals for a settlement on the wife of a bankrupt, approved of the settlement on her of the entire of a legacy, which had been bequeathed to her since her marriage, on the ground that she had been abandoned by her husband, and was left without means of support; exceptions were taken to his report, and allowed. The Vice Chancellor (Sir Thomas Plumer) went very much at length into the learning on the subject, and showed, from a review of the authorities, that the law of the Court was, that the wife should have only an allowance out of her equitable choses in action, and not to have the entire of them settled on her on the bankruptcy of her husband. *Green v. Otte*<sup>z</sup> is to the same effect. This was a very strong case for excluding the assignees from any share in the fund. The husband had received 1500*l.* 3 *per cent.* stock with his wife on her marriage, and had not made any settlement upon her. He afterwards became bankrupt, and she obtained a decree of divorce against him, on the ground of adultery and ill treatment. But the Vice Chancellor was of opinion, that, if separation and divorce from the husband could, in any case, give a special equity to the wife, it would not affect this case, because the whole proceeding was subsequent to the bankruptcy, and, con-

According to the present practice, wife entitled to a provision only for her equity.

<sup>x</sup> Cooke's Bankrupt Laws, 287.  
6th edit.

<sup>y</sup> 1 Mad. C. C. 362.  
<sup>z</sup> 1 Sim. & Stu. 250.

sequently, after the right to the legacy had vested in the assignees. And it was referred to the Master to approve of a proper settlement, regard being had to the extent of the wife's fortune, and to any settlement which may already have been made upon her.

Wife of insolvent husband entitled to a provision out of her equitable interests.

These are instances of transfers by operation of law to general assignees, occasioned by the bankruptcy of the husband; but there may be an assignment by operation of law occasioned by the insolvency of the husband, who is not an object of the bankrupt acts; and when such an assignment takes place, the same equity pursues the wife's equitable property as in cases of the bankruptcy of the husband. So it was in the case of *Worral v. Marlur*,<sup>a</sup> where Sarah Worral, by her next friend, filed her bill, stating, that her father, James Pell, previous to his marriage, had become bound to John Market in the penal sum of 20,000*l.*, conditioned (amongst other things) for payment of one full third part of such real and personal estate as he should die seised or possessed of, unto the said John Market, in trust for such of the children of the marriage as should be living at his death, to be equally divided between them. That her said father had two children, herself and James Pell, the younger; that she had married John Worral in her father's lifetime, without his consent, and without any fortune or settlement. That her husband, after the marriage, had taken the benefit of an insolvent debtor's act, and an assignment of his estate was duly executed to Bushman, one of his principal creditors. That her father died in some years after, having made his will, by which he bequeathed to her a sum of 8000*l.* in lieu of her share of the estate to which she was entitled by virtue of the bond, if she chose to accept of it, and, if not, he gave her nothing; and he gave the residue of his estate to James Pell, the younger. And she offered to accept of the legacy of 8000*l.*; and prayed, that she might be at liberty to make her election thereof under the direction of the

<sup>a</sup> 1 Cox's Rep. 153. 1 P. Wms. 458. note 1.



Court, and that the money might be laid out, and settled for her separate use, and some provision made thereout for her children. On the other hand, the assignee of the insolvent filed a cross bill, claiming to be entitled to make such election as Worrall would have been entitled to make, if he had not become insolvent, and praying an account of the real and personal estate of the testator. When the Master's report came in, two questions were made on the part of the assignee; first, Whether this interest, which the plaintiff had taken under the bond, or by the will, in the real and personal estate of the father, passed by the act of parliament to the assignee? Secondly, Whether, if it did, the assignee could take it, without making a provision for the wife and the issue of the marriage? Lord Hardwicke said, that he had considered the several cases on the subject, and did not find it any where decided, that, if the husband makes an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife out of the property assigned; but that a court of equity has much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law; for as to the latter, his Lordship's opinion was, that, where the equitable interest of the wife was transferred to the creditor of the husband by mere operation of law, (as in the present case,) he stood exactly in the place of the husband, and was subject precisely to the same equity with respect to the wife.

But the wife is entitled to her equity out of her unsettled equitable interests, not only where there has been an assignment occasioned by the bankruptcy or insolvency of the husband, but also where he makes a general assignment of all his estate for the benefit of his creditors; for in this latter case, the assignees cannot get the possession of such property belonging to her, without making a provision for her; and it is immaterial whether such interest be a principal sum or for life only; for in either case she is entitled to her equity: and so it was ruled in *Pryor v. Hill*.<sup>b</sup> Here

Wife of husband assigning his effects for payment of his debts, entitled to provision out of her equitable interests against the assignees.

Wife entitled to a provision out of a life interest against the general assignees of her husband for payment of his creditors.

William Barber had bequeathed to a trustee for Catherine Mason, the interest of a large sum of money for her life, and after her death, he limited the principal to her children. The defendant Mason, the husband of Catherine, being indebted to the plaintiffs and to other persons, made a general assignment to the plaintiffs of his stock in trade, debts, and other effects whatsoever, in trust for themselves and the rest of his creditors. The plaintiffs filed their bill against the trustees under the will of William Barber, and against Mason and his wife, praying to be paid the interest and dividends of this money until they should have received their full demands; and the question was, Whether the assignees were entitled to those dividends without making a provision for Catharine Mason for her life, she having children who, after decease, would be entitled to the principal? The counsel for the plaintiffs admitted the general equity of the Court in requiring a settlement on the wife before the husband could obtain her property, either from the Court, if it was there, or out of any other fund in trust for the wife. They admitted this equity in the case of a bankrupt, as represented by assignees; but they insisted that no case was to be found in which the Court had extended this rule to the mere life interest of the wife, contending, that on principle it could not fall within the rule, because if it was to be considered as intended for her maintenance, the husband had fairly bought it by his obligation to maintain the wife, as well as to pay her debts. It was also admitted, that if the wife's claim had been to a principal sum, the demand of a reference to the Master could not be resisted; and a distinction was attempted to be made between the wife's claim to interest, and her claim to a principal sum; but the Master of the Rolls said, "The assignment in this case being equivalent to an assignment in law by bankruptcy, I cannot see why the Court should not admit the same equity of calling on the assignees to make a provision for the wife. The assignees are not entitled to the annuity without making such provision. If the parties cannot agree, I can only say, I

cannot assist the assignees to get it without making a provision." His Honour therefore referred it to the Master, in order that the assignees might make an offer.

So that it appears to be now settled law, that neither the general assignment in bankruptcy, nor that under the insolvent debtor's act, nor the general assignment by a debtor of all his effects to a trustee for the benefit of his creditors, passes the equitable interest of the wife to the assignees, discharged from her claim to a provision, and that her life interest, as well as her interest in a principal sum, is subject to this equity.

## CHAP. IV.

OF THE WIFE'S EQUITY, AS IT IS ADMINISTERED TO HER  
AGAINST THE PARTICULAR ASSIGNEES OF HER HUSBAND.

Wife insufficiently provided for, entitled to her equity against her husband's particular assignee for valuable consideration.

Wife's life interest not subject to her equity against particular assignee.

Thus it appears that a wife is not barred of her claim to a provision out of her equitable interests by the assignment of her husband's rights and credits effected either by operation of law, or by his own general transfer of them for the benefit of his creditors ; and this favour is granted to married women, not only where the question occurs between them and the general assignees of their husbands, but it is extended even to the cases of particular assignees ; the rule now being settled to be, that if the husband assign the equitable interests of his wife, (who is insufficiently provided for by him,) equity will not assist such assignee to acquire the possession of them, unless he submit to make a provision for her, even though that assignee should have paid a valuable consideration for them. A distinction is however to be observed between an assignment by operation of law, as in cases of bankruptcy and insolvency, and an assignment to a particular assignee ; for in the latter case, the wife has no right to a provision out of her mere life interest, though she would, where the husband had become bankrupt or insolvent, or had abandoned her without providing her with the necessary means of subsistence. In *Elliott v. Cordell*,<sup>a</sup> the Vice Chancellor stated the law on this subject to be, " That if the husband desert his wife, and fail to perform the obligation of maintaining her, which is the condition on which the law gives him her property, this Court will apply any equitable interest which he retains for the life of the

wife, either wholly or in part, for the maintenance of the wife : and if the husband becomes bankrupt, or takes the benefit of an insolvent debtor's act, this Court will fasten the same obligation of maintaining the wife out of the property of this description which devolves, by act of law, upon the general assignee ; for when the title of such assignee vests, the incapacity of the husband to maintain the wife has already raised this equity for the wife ; but the same principle does not necessarily apply to a particular assignee for valuable consideration, who purchased this interest when the husband was maintaining the wife, and before circumstances had raised any present equity in this property for the wife, whatever may be the force of general reasoning upon it."

And to the above rule, thus qualified, there is no exception, unless it be where the assignment is of a trust of a term of years of land, (of which there is some doubt ;<sup>b</sup>) and one of the reasons given for not subjecting this interest to the same claim of the wife, to which all her other equitable estate is liable, is, that the trust of a term for years may be taken in execution, under a *fiery facias*.<sup>c</sup> Indeed, the extension of this rule to all cases of contracts for assignments of the wife's equitable property, though for valuable consideration, (with the above exception,) was quite essential to the existence of this equity ; for if an agreement by the husband, to assign for valuable consideration, would enable the assignee to possess himself of the wife's equitable choses, discharged of her claim to a provision, the husband would never apply to the Court for assistance to reduce them into possession, which he could not have except on the usual terms : he would pass all his interest in them to a third person for valuable consideration, and thus oust the Court of its power of interference ; but when the wife's equity is held to attach upon the property itself, and to adhere to it under all changes, she is amply protected in this right, as nothing can bar her claim but her own consent,

<sup>b</sup> Macaulay v. Philips, 4 Ves. 17. Franco v. Franco, 4 Ves. 528.  
<sup>c</sup> 4 Ves. 528.

or a sufficient settlement by her husband. As to assignments of the wife's equitable interests without a valuable consideration, they never have been held to bar her equity to a provision,<sup>d</sup> where there has been no settlement; for, as a voluntary assignment of her equitable choses in action will not bar her right to them by survivorship, if she should outlive her husband;<sup>e</sup> so, of course, such an assignment cannot deprive her of any claim which she might have upon them during his lifetime.

An instance where assignees for valuable consideration took wife's equitable interests, discharged of her equity. *Sed quære?*

Doubts certainly were at one time entertained by Lord Thurlow, whether an assignment for valuable consideration might not support the right of the assignee, or at least evade this equity.<sup>f</sup> There is, however, but one decision in support of such a claim of the assignee; that is the case of *Povey v. Brown and others*;<sup>g</sup> for the wife of the defendant having a legacy of 1000*l.* bequeathed to her by her uncle, before her marriage, it was afterwards, on a treaty of marriage with the defendant, agreed that 700*l.* of the money should be applied towards payment of his debts. After the marriage, the defendant, without his wife, assigns the remaining 300*l.* to the plaintiffs, who were creditors, and they brought this bill against the defendant and his wife, and the executors of her uncle, to have a satisfaction of their debts out of the remaining 300*l.*; and it was decreed that an account should be taken; and upon the plaintiffs proving themselves real creditors, and that the assignment was *bond fide*, they were to have a satisfaction accordingly, and the residue, if any, of the 300*l.* was to be put out for the benefit of the wife.

This seems to be a direct authority in support of the right of the husband's assignee for valuable consideration to hold the wife's equitable interests discharged of her claim to a provision; but it is to be remarked, that Sir William Grant says of it, "that it is a case which does not satisfy

<sup>d</sup> *Jewson v. Moulson*, 2 Atk. 420.

<sup>e</sup> *Burnet v. Kinaston*, 2 Vern. 401. *Prec. Chan.* 118.

<sup>f</sup> 1 P. Wms. 458. note 1. 1 Cox's C. Rep. 153.

<sup>g</sup> *Prec. Chan.* 225.

him ; that it is a strange case, and directly contradicted by two cases, one before Lord Hardwicke, and the other before Lord Northington.<sup>h</sup> The cases to which his Honour adverted were, *Jewson v. Moulson*,<sup>i</sup> and *Wenman v. Mason*.<sup>j</sup> The former case was this : the husband, one Vobe, assigned to the defendant Moulson, to whom he was justly indebted, all the share to which, in right of his wife, he was entitled in her late father's personal estate. Vobe made a second assignment of his wife's share to trustees for the benefit of all his creditors in general. The share of the wife amounted to 600*l.*, and the debt due to Moulson was 500*l.* There were two bills filed, one by the executors of Mrs. Vobe's father, to be discharged of their trust upon paying over her share of her father's personal estate. The second bill was by Moulson, who claimed a right to this share of the wife, under the assignment from her husband. Lord Hardwicke said, " That as against the husband and the assignees who claimed under the second assignment, the equity was extremely plain. That as to the assignment by particular contract for valuable consideration, it was difficult to reconcile the cases on that head ; though one thing was clear through them all, that if the husband made a voluntary assignment of the wife's portion, the volunteer must stand in the place of the husband." His Lordship then cited several cases with respect to the assignment of trust terms for years of lands of the wife, wherein, he said, it was held, that the particular contract of the husband for valuable consideration had got the better of the wife's equity to have a provision. But his Lordship distinguished the principal case from those by the following circumstances : that the fund out of which the portion was to arise was of a mixed nature, partly real, partly personal ; that the wife during these transactions was a minor ; that this was not an assignment of a term for years, or of a specific thing, but an assignment at once of all her fortune, which her husband could not reduce into possession without the assistance of

Assignee for valuable consideration of wife's equitable interests, liable to wife's equity.

<sup>h</sup> Like v. Beresford, 5 Ves. 512.      <sup>j</sup> 1 P. Wms. 458. note 1.  
<sup>i</sup> 2 Atk. 417.

this Court; and that the defendant Moulson must have known all these facts, and also must have been acquainted with the rule of equity in regard to provisions to be made for a wife out of her own fortune. His Lordship said, he was therefore of opinion, not to allow the creditor to receive the whole fortune of the wife without making a provision for her.

His Lordship seems to have been anxious to distinguish this case from those which he had cited in favour of a particular assignee for valuable consideration, and to endeavour to account for a contrary decision by himself by the particular circumstances then before him; and therefore this judgment does not amount to a full establishment of the naked rule, that a married woman cannot be barred of her equity to a provision out of her own fortune by the assignment of it by her husband for valuable consideration. But in *Wenman v. Mason*,<sup>k</sup> Lord Northington decreed the wife a provision out of her legacy, which she and her husband had joined in assigning for valuable consideration. In this case husband and wife joined in assigning her share in a legacy to one Humfrey, to secure to him 300*l.*, for which he had joined the husband in a bond. The husband afterwards became a bankrupt, and Humfrey, the assignee, who had been obliged to pay the 300*l.* for which he had joined in the bond, filed this bill against the general assignees under the commission, and against the husband and his wife, and other persons, praying to have the wife's share of the legacy paid to him in discharge of the debt, and the remainder to be paid to such of the defendants as should appear to be entitled thereunto. And the Court directed that 300*l.* of the legacy should be applied for the benefit of the wife and her children.

Wife entitled to her equity out of a legacy, against an assignment for valuable consideration, which she had joined her husband in making.

Doubts of Lord Thurlow as to the liability of assignee for valuable

However, subsequent to this decision, Lord Thurlow intimated a doubt, whether an assignee for valuable consideration should be bound to make a provision for the wife out of the property so assigned; for he says, "I have

<sup>k</sup> 1 P. Wms. 458. note 1.



looked into the several cases on this subject, and I do not find it any where decided, that if the husband make an actual assignment by contract for a valuable consideration, the assignee shall be bound to make any provision for the wife out of the property assigned ; nor do I find any case decided the other way ; but this Court has much greater consideration for an assignment actually made by contract, than for an assignment by mere operation of law. For as to that my opinion is, that when the equitable interest of the wife is transferred to the creditor of the husband by mere operation of law, without any express consent of the wife, as in this case, he stands exactly in the place of the husband, and is subject precisely to the same equity in respect of the wife. And it seems to me that in *Jewson v. Moulson*,<sup>1</sup> Lord Hardwicke went on the ground of the transfer being by immediate contract, made upon the occasion, in contradistinction to a transfer by operation of law."<sup>m</sup> However, it is apprehended that whatever doubts may have existed formerly on this subject, they are now completely removed, although there has not been any express decision on the point from the time at which the above observations were made by Lord Thurlow. Since that period, repeated dicta have fallen from the bench, expressive of their clear opinion in favour of the wife's equity against an assignee for valuable consideration. In *Pope v. Crashaw*,<sup>n</sup> the Master of the Rolls said, "That he hoped it would be understood that a husband cannot, by assigning his wife's property, bar her of any equity she may have in it ; that he never would subscribe to the contrary doctrine." The Reporter does not state the facts of this case, nor does it appear whether it was argued or considered. However, it is evident from the case of *Ellis v. Ellis*,<sup>o</sup> which was shortly subsequent, that the question was not looked on by the bar as having been settled ; for in this case a married woman, entitled to money in the funds, filed a bill to restrain her husband

consideration to wife's equity.

Wife not barred of her equity by any assignment by husband.

Injunction granted against husband, at the suit of his wife, to restrain him from assigning her money in the funds.

<sup>1</sup> 2 Atk. 420.

<sup>m</sup> *Worrall v. Madlar*, 1 Cox's Rep. 153. 1 P. Wms. 458. note 1.

<sup>n</sup> 4 Br. C. C. 325.

<sup>o</sup> 1 Vin. Ab. Sup. 475.

Injunction granted against husband at suit of wife, to restrain his assignment of her equitable property.

Wife's equity not to be barred or evaded by assignment by husband, even in discharge of a fair debt.

from assigning it, and to compel him to make a settlement ; and Mr. Scott, who was for the plaintiff, said, that the Court would restrain the act, which would have the effect of destroying the plaintiff's equity against her husband, which would not prevail against the assignee. And Lord Loughborough continued the injunction on a motion for that purpose, and ordered the husband to lay proposals for a settlement before the Master. So, in *Roberts v. Roberts*,<sup>p</sup> which was heard two years afterwards, where a bill was filed by the wife against her husband, praying similar relief ; the bill suggested that by an assignment for valuable consideration the husband would deprive the wife of the benefit of such provision. But the Master of the Rolls ordered the injunction, saying, that he had no difficulty in granting it to prevent the husband from incumbering the case with new parties, but desiring it to be understood, that he did not make the order under the idea that a purchaser or assignee for valuable consideration from the husband, of the wife's property, could put himself into a better situation than the husband ; on the contrary, his Honour said, " the more he thought upon the subject, the more he was satisfied that such an assignee must be subject to the same equity." So that from the language of counsel in *Ellis v. Ellis*,<sup>q</sup> and of the bill in *Roberts v. Roberts*,<sup>r</sup> it would seem to be the impression of the bar at that period, that the assignment by the husband of the wife's choses in action for valuable consideration would have destroyed her equity. This subject was very fully discussed in *Like v. Beresford*,<sup>s</sup> which was heard in two years after *Roberts v. Roberts* ; and although the case was not decided upon this point, yet the Master of the Rolls expressed a clear opinion, that the wife's equity could not be barred or evaded by the husband's assignment of her fortune for valuable consideration, though in the discharge of a fair and honest debt. A bill had been filed in November, 1780, by the father and next

p 2 Cox's Rep. 422. 1 Sup. Vin. Ab. 476.  
q Vide supra.

r Vide supra.  
s 3 Ves. 506.

friend of Sidney Hamilton, a minor, against her trustee; and under an order of the Court the defendant transferred the sums of 2600*l.*, and 780*l.* bank stock, admitted to be standing in his name on account of the trust, into the name of the Accountant General, in trust in the cause, to the account of the infant. In the same month Sidney Hamilton eloped to Scotland with Mr. Beresford, and was married to him. Immediately after the marriage, Mr. Beresford, in his own name, and in that of his wife, filed a bill of revivor and supplement, praying, that in right of his wife he might be declared entitled to the trust moneys, or part thereof, or that a proper settlement might be made. While this cause was depending, Beresford became indebted to Thomas Like, an upholsterer, for money and goods supplied for the use of himself, and of his wife; and, by a deed of assignment, dated the 13th of March, 1783, reciting Mrs. Beresford's interest in the bank stock under the will of her grandfather, the proceeding in the Court of Chancery, and a former assignment of the same stock by Mr. Beresford to a person of the name of John Robert, for money due to him, and also reciting, that he, Beresford, was indebted to Like in the sum of 292*l.* 3*s.* 6*d.*, and that he had agreed to lend to Beresford the weekly sum of 2*l.* 2*s.* for nine months, for securing which, he, Beresford, had agreed to assign the said bank stock in trust for Like, and such other creditors as Beresford should appoint, subject to the former assignment to Roberts. • Beresford, therefore, in consideration of that sum due, and of the said weekly allowance, assigned, &c. &c. to Like, his executors, &c. &c., the said bank stock, with all interest and dividends then due, or which should after become due, upon the trusts aforesaid. There was a decree on the bill filed by Mr. Beresford, and an appeal from it in 1789 before Lord Thurlow, when, by consent, that decree was reversed, and it was declared, that on the 11th December, 1780, Sidney Beresford became entitled to the said bank stock, and the dividends accrued, and it was ordered, that Beresford should lay proposals before the Master for a settlement. A proposal was, accordingly, made, and ap-

proved of by the Master, and on the 9th March, 1791, the cause was brought on for further directions, when a petition was presented by Like and Robert, the assignees of the bank stock, stating their case, to induce the Court to suspend the ordering of the settlement. The petition, however, was dismissed, and it was ordered, that the settlement should be carried into execution. The stock was, accordingly, settled to the separate use of Mrs. Beresford during her life, and after her death a moiety of the dividends to Mr. Beresford for his life; the other moiety for the maintenance and education of their children; and after the death of the survivor of husband and wife, then to the children, &c. &c.

Like and Robert then filed their bill, in which they prayed, that they might be declared entitled to be satisfied in respect of their debts out of the dividends accrued upon the stock since the marriage of the defendants, and that if the dividends should not be sufficient, that so much of the funds should be sold as would make up the deficiency. It was contended for the assignees, that whatever the rule of the Court was, as to the equity of the husband to assign his wife's fortune for valuable consideration, it must be supposed, that he had a right to transfer the dividends accrued, and that if that were not so, there was no case going the length of determining, that a husband, maintaining his wife, should not be entitled to the interest of her fortune; but his Honour Lord Alvanley said, that he had neither doubt nor difficulty upon the subject; that he had looked into almost every case, and had never found it determined, that the assignee of the wife's fortune, for valuable consideration, could hold it against her claims for a provision; that this was the case of a person who had run away with a ward of the Court, of very tender years, and then insisted on this right; that, upon the best consideration, he was of opinion, that, if it was *res integra*, and it came on now not upon a bill to undo a settlement already made, the Court has a complete right, if they think fit, under all the circumstances, to give to the wife and children any part, or the

whole, of the fortune to which she may be entitled; that when this cause came on before the Lord Chancellor Thurlow in 1791, it was for him to consider whether there was any right in the assignee of the husband, of which assignment there was certainly knowledge; and he was of opinion there was no such right; that the question was, whether his Honour was called on to break in on that; that he confessed, if he could, he should have been glad to have made some decree in favour of the plaintiffs, and to have given them some share of the profits, upon the credit of which Beresford had lived, and was enabled to make advances in favour of his wife and children; but that all that was before Lord Thurlow, and he did not think fit to attend to that claim; that he could not declare any right to the plaintiffs in any share of that part of the wife's fortune that had been settled under the decree of Lord Thurlow, who had all the circumstances before him.

This case, however, is not an authority upon the strength of the wife's claim against the assignee of her fortune for valuable consideration, for the ground of the decision was, that Mrs. Beresford had been a ward of Chancery, and had been carried off to Scotland, and married without the consent of the Court, by which the husband had been guilty of a contempt, in consequence of which he was punished by Lord Thurlow in the usual way; namely, by a settlement of his wife's fortune upon herself for her separate use for her life, with remainder as to one moiety of the dividends to himself for life, and as to the other moiety, to the children, &c. &c.; and the Master of the Rolls sustained that settlement against the assignees of the husband for valuable consideration, on the ground that the Court of Chancery had a right to order such a settlement under such circumstances; so that, in fact, this case has only asserted the right of the Court of Chancery to settle the entire of the wife's fortune upon her, in opposition to the husband's assignee of it for valuable consideration, where she has been a ward of the Court, and has been married without consent; but it decides nothing as to the wife's equity against such an assignee,

Wife not  
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although his Honour gave his opinion very fully and decidedly upon this point. In like manner, in *Macauley v. Philips*,<sup>t</sup> which was subsequent to *Like v. Beresford*, the same judge gave a very clear opinion in favour of the wife's equity against an assignee for valuable consideration, although that question was not then before the Court. His Honour said, "Many cases upon this point have been before me, which have put me under the necessity of considering very much the right of the wife; and I am clearly of opinion, the doubt respecting the assignment of the husband for valuable consideration of the wife's equitable interest, was not well founded, with the single exception, perhaps, of a trust of a term for years of land, upon which, perhaps, there may be some doubt;"<sup>u</sup> but subject to that, I am clearly of opinion, an assignment for valuable consideration will not bar the equity of the wife; and it would be strange if it did, since the determinations in the courts of law with regard to an action brought against executors by the husband, for a legacy due to the wife. It is determined, that the action does not lie;<sup>v</sup> and the reason given is, that it would totally defeat the wife's equity. It would be whimsical, that the assignment by the husband for a valuable consideration should put that assignee in equity in a better situation than the husband himself is in at law. The guard of this court upon the wife's interest would be very singular, if the husband, not being entitled at law, might assign it for valuable consideration to another person, who would be enabled in equity. I am clearly of opinion, it was only a doubt, and it never was decided, that the husband could, by such assignment, or by any other means, deprive her of her equity." So, in *Franco v. Franco*,<sup>w</sup> his Honour, although he did not decide this point, the facts, as he said, not being sufficient for that purpose, adhered to the opinion he had given in *Macauley v. Philips*;<sup>x</sup> but his Honour's judgment is rendered particularly valuable to this subject by his

<sup>t</sup> 4 Ves. 19.

<sup>u</sup> *Franco v. Franco*, 4 Ves. 528.

<sup>v</sup> *Deeks v. Strut*, 5 T. R. 590.

<sup>w</sup> 4 Ves. 515.

<sup>x</sup> 4 Ves. 17.

statement of a case furnished to him by Mr. Powell, from a note in a manuscript book of Mr. Fearne. The case was that of *The Earl of Salisbury v. Newton*,<sup>y</sup> in Chancery, on the 2d of July, 1759. The facts were these : a married woman being entitled to a sum of money in the hands of trustees or executors, her husband having made no provision for his wife or children, and being indebted to the Earl of Salisbury, assigns, as a security for that debt, the sum of money to which his wife was entitled, and dies, making no provision for his wife and children. The trustees refusing to assign, the Earl of Salisbury filed the bill ; but the Lord Keeper (Henley) refused to give him any relief, as no provision was made for the wife and children, and he could be in no better situation than the husband, and the Court would have put terms upon him.

Wife not barred of her equity by husband's assignment for valuable consideration.

There is also the case of *Hill v. Atkinson*, at the Rolls, 26th June, 1797, mentioned in the notes to the above case of *Franco v. Franco*, where this point came on upon a petition, and the Master of the Rolls, Lord Alvanley, was of the same opinion that he gave in the other cases, and expressed himself against the judgment of Lord Thurlow, in *Worral v. Marlar*,<sup>z</sup> where his Lordship said, that he did not find it any where decided, that if the husband make an actual assignment by contract for a valuable consideration, the assignee should be bound to make any provision for the wife.

The next case in which this equity of the wife, as against the assignee for valuable consideration, was discussed, although it was not decided, was that of *Morley v. St. Alban*.<sup>a</sup> In this case it appeared that Mrs. St. Alban was entitled for her life before marriage to dividends of stock standing in the names of trustees. Her husband granted an annuity of 100*l.*, and assigned the dividends producing 260*l. per annum* to secure it. Sir George Wright joined the husband as a security for the payment of the annuity,

<sup>y</sup> Since reported in Eden's Chan. Cas. 370.

<sup>z</sup> Mr. Cox's note to Bosvil v. Brander, 1 P. Wms. 459.  
<sup>a</sup> 11 Ves. 20.

and having paid some instalments, he filed a bill, praying out of the dividends to be repaid. His Honour decreed according to the prayer of the bill, saying, that the circumstances did not make it necessary to determine the much litigated question, whether the equity of the wife can be barred or affected by the husband's assignment for valuable consideration. Thus much is certain, that if the particular assignee for valuable consideration be not in a better, at least he is not in a worse condition than the general assignees under a commission of bankruptcy; that the annuity being but 100*l. per annum*, and the dividends amounting to 260*l.*, if it was a case of an assignment by act of bankruptcy which would transfer the entire of these dividends, it would be considered that the assignees acted liberally and favourably towards her, if they allowed her to retain 160*l. per annum*; and that it was therefore unnecessary to consider what might have been the case, if the husband had charged the fund to its entire extent, or to a greater extent than he had; for that he must hold it valid to the extent of 100*l. per annum*.

In this case, his Honour supported this assignment for valuable consideration without any allowance of the wife's equity out of the part assigned, because the husband had left as much of the fund untouched as would have satisfied that claim, if he had conveyed away the entire of it. His Honour also decreed, that Mrs. St. Alban was entitled to the remaining 160*l. per annum* as a separate maintenance. But, although he was enabled to secure this sum to her without deducting any portion of the annuity from the assignee of it for her equity, still it was not because she was not entitled to her equity out of that part of her interest which her husband had disposed of, but upon this ground, that Mr. St. Alban, having abandoned his wife, and left her destitute of support, the Court exercised its power of allowing a maintenance to her of 160*l. per annum* out of her own life estate, which was within its control, without any reference to her equity. But if Mr. St. Alban had returned to England after the decree, and had main-



tained his wife, then, it is apprehended, that he would be entitled to the receipt of the 160*l.* *per annum*, and that the Court could not deprive him of it, so long as he continued to maintain her ; and that, if he assigned that part of her life interest also, she would be entitled to a provision not only out of that, but out of the 100*l.* *per annum* which had been previously assigned for valuable consideration. So that the case of *Morley v. St. Alban* is not to be ranked with that class in which a provision was secured to a married woman out of her equitable interests against a particular assignee ; but it belongs to that class of cases in which a court of equity arrests the wife's property that is within its reach for the purpose of providing a maintenance for her, when she has been abandoned by her husband, and left without the means of support.<sup>b</sup>

From this enumeration of the authorities, it appears that there is no modern case directly deciding this point, however the decisions by Lords Hardwicke<sup>c</sup> and Northington,<sup>d</sup> and the opinions of Lord Alvanley<sup>e</sup> and Sir William Grant,<sup>f</sup> leave but a little doubt that, when the question shall next be raised before the Court, the result will be favourable to the wife's claims against the assignee for valuable consideration. And if this shall be so, then the law of the Court, with respect to the assignment of the wife's equitable interests, will stand thus : that neither the voluntary assignment by the husband,<sup>g</sup> nor his assignment for valuable consideration, nor the assignment under his bankruptcy<sup>h</sup> or insolvency, bar the equity of the wife.

There is, however, an exception to the rule, as to the wife's claim to a provision out of her equitable interests as against the assignee of them for valuable consideration ; for it does not extend to her trust terms for years of lands, as

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<sup>b</sup> See *infra*, Chap. IX.

<sup>c</sup> *Jewson v. Moulson*, 2 Atk. 417.

<sup>d</sup> *Lord Salisbury v. Newton*, 1 Eden's Rep. 370.

<sup>e</sup> *Pope v. Crashaw*, 4 Br. C. C. 325. *Like v. Beresford*, 3 Ves. 506. *Macauley v. Philips*, 4 Ves.

17. *Franco v. Franco*, 4 Ves. 528. *Hill v. Atkinson*, in a note to *Franco v. Franco*.

<sup>f</sup> *Wright v. Morley*, and *Morley v. St. Alban*, 11 Ves. 17.

<sup>g</sup> *Burnet v. Kinaston*, 2 Vern. 401.

<sup>h</sup> *Mitford v. Mitford*, 9 Ves. 87.

an assignment by her husband, with or without consideration.

the husband may dispose of these with or without valuable consideration, without making any settlement upon her in respect of them. This was decided, for the first time, in *Sir Edward Turner's case*,<sup>i</sup> on an appeal to the House of Lords, who held, that a term being assigned in trust for a *feme covert* by her former husband, and she afterwards intermarrying with the Lord Chief Baron Turner, who had aliened the term, the same was well passed away, and that the husband might dispose thereof. This decision was followed in the next term by Lord Nottingham, in the case of *Pitt v. Hunt*,<sup>j</sup> but his Lordship expressed great dissatisfaction on the occasion. *Tudor v. Samyne*<sup>k</sup> was of a similar description, and was decided in the same way on the authority of *Sir Edward Turner's case*, although it was urged on the part of the wife that no settlement had been made on her by her husband.

But, although this doctrine with respect to terms for years has been followed in several other cases,<sup>l</sup> yet it has been sometimes denied;<sup>m</sup> and even, lately, Lord Alvanley has expressed his doubt, whether the husband had any such power over his wife's trust terms for years;<sup>n</sup> admitting, however, on another occasion, that he had not considered the point sufficiently to form an opinion upon it.<sup>o</sup> But, though in general the husband may dispose of the wife's trust term discharged of her equity, yet he cannot do so if it has been assigned in trust for her with his privity and consent;<sup>p</sup> as when it has been settled for a maintenance or jointure.<sup>q</sup>

Creditor of husband cannot have wife's equitable interests.

But whatever right the husband's assignee for valuable consideration of the wife's equitable choses in action may have with respect to them, it seems, that the mere creditor of the husband, who has had no assignment, has no claim;

i 1 Vern. 7.

j 1 Vern. 18. 2 Cas. in Chan. 73.

k 2 Vern. 270.

l See note 1. to *Sir Edward Turner's case*, 1 Raithby's Vern. 7.

m See note 2. to *Sir E. Turner's case*, 1 Raithby's Vern. 7.

n *Macauley v. Philips*, 4 Ves. 19.

o *Franco v. Franco*, 4 Ves. 528.

p *Sir Edward Turner's case*, 1 Vern. 7. *Draper's case*, 2 Freem. 29.

q *Bullock v. Knight*, Chan. Cas. 266.

for, where a creditor filed a bill against the trustee of a bond which had been executed as a security for part of the wife's fortune, praying that he might be paid the amount of his demand out of it, Lord Nottingham dismissed the bill.<sup>r</sup> And where the husband's creditor happens to be the trustee of the wife's equitable interests, or in any other way to have the legal estate in them, such creditor will not be permitted to set off the debt due to him by the husband against the wife's claim to a provision, if she have filed a bill to enforce it.<sup>s</sup> Nor, where the wife is entitled to a share of an intestate's personal estate, as one of his next of kin, can the administrator set off against her claim a debt due by her husband to the intestate.<sup>t</sup>

Creditor of husband being trustee of the wife's equitable interest, not permitted to set off the debt against wife's equity. Administrator cannot set off share of in-

debt of husband to intestate against wife's claim to a provision out of her intestate's property, as one of next of kin.

But, in *Ex parte O'Ferrall and Others*,<sup>u</sup> the executors of a person who had bequeathed 1000*l.* to the wife of the bankrupt, were allowed to set off a moiety of the legacy against a debt due by the bankrupt to the testator, the other moiety being ordered to be settled on the wife for life, with remainder to the issue of the marriage. The only difference between this case and *Carr v. Taylor*,<sup>v</sup> is this, that the set-off was allowed in the one case, and not in the other; but, in both cases, the wife was allowed her equity out of the fund, in the one against the assignees, and in the other against the executor. And thus it appears, that, so long as the Court has the direction or control of the fund out of which the equity of the wife is to be served, her claim cannot be defeated by any management of the husband, as by assignment without, or for valuable consideration; and that his creditors will be postponed to her, even when they have the advantage of possessing the legal estate, in the interests out of which they seek to raise the amount of their demands.

Contra. Executor can set off part of legacy left by testator to bankrupt's wife, against debt due by him, making provision for her out of remainder.

<sup>r</sup> *Mason v. Masters*, cited by Lord Northington in *Forbes v. Phipps*, 1 Eden's Cases, 506.

<sup>s</sup> *Lady Elibank v. Montolieu*, 5 Ves. 737.

<sup>t</sup> *Carr v. Taylor*, 10 Ves. 574.

<sup>u</sup> 1 Glyn & Jam. 347.

<sup>v</sup> 10 Ves. 574.

## CHAP. V.

OF THE SETTLEMENT BY WHICH THE WIFE MAY BE BARRED OF  
HER EQUITY.

Wife barred of her equity by adequate settlement before marriage.

It thus appears, that neither the general nor the particular assignment of the wife's equitable choses in action precludes her claim to a provision out of them. However, there are acts by which a married woman may be barred of this right to a provision, and by which her equitable property may be reduced into possession by her husband, and may pass to his assignees, whether general or particular, free and discharged from any claim of this kind. And this may happen when her husband has made a settlement upon her before her marriage, because, by such an act, he may have made himself the purchaser of her entire fortune, by which means he will be permitted to take that part of it which is of an equitable quality, without having any terms imposed upon him. And this effect will be produced, first, by a settlement adequate to the wife's entire fortune; secondly, by a settlement expressed to be in consideration of that fortune. Wherever the settlement is equivalent to the wife's fortune, it will be presumed to be the intention, that the husband should have it,<sup>a</sup> although there be no express agreement between the parties that it should be so. Indeed, Lord Hardwicke seems to have thought, that a settlement by the husband before marriage, whether adequate or not, would amount to the purchase of the entire of the wife's portion; and that the question of inadequacy could never arise, except upon cases of voluntary settlements after marriage.<sup>b</sup> But the rule is now settled, that a settlement cannot be the

<sup>a</sup> Blois v. Hereford, 2 Vern. 501. 2 Freem. 281.

<sup>b</sup> Lannoy v. Duke of Athol, 2 Atk. 448.

purchase of the entire of the wife's portion, unless it be expressed to be in consideration of it, or such an intention appear from the contents and import of the instrument, as clearly as if it were expressed in terms.<sup>c</sup> And the adequacy of the settlement is a circumstance from which an intention will be inferred, that the husband should be the purchaser of the fortune. It is evident, indeed, that a mere settlement before marriage will not be considered to entitle the husband to the entire of his wife's fortune, and that a question may arise as to the adequacy of such provision, because it is the present practice, where there has been an accession of fortune to the wife during the coverture, to inquire whether the settlement on the marriage be equivalent, and, if it be not, to order that the husband shall make a further settlement.<sup>d</sup>

A settlement not the purchase of the wife's portion, unless it be so expressed, or clearly appear to be so.

The case of *Blois v. Lady Hereford*,<sup>e</sup> proves that an adequate settlement makes the husband the purchaser of his wife's entire fortune. In this case there was no mention made in the marriage articles, nor in the settlement of 1300*l.* due to Lady Hereford upon a mortgage; and the question was, whether this sum survived to the defendant; and it was held that it did not, the Lord Keeper laying down the rule to be, that "in all cases where the settlement was equivalent, it shall be intended that the husband was to have the portion, for the wife should not have her jointure and her fortune both." This, though a case upon the wife's right of survivorship, is also an authority upon the wife's equity, for if Lady Hereford had claimed a provision out of this 1300*l.* during her husband's life, it is evident, it would have been held that she was not entitled to it, as her husband had purchased the mortgage money by the settlement. Indeed, Mr. Cox, in his note to the case of *Lord Carteret v. Paschal*,<sup>f</sup> states the doctrine on this subject much more

An adequate settlement by the husband, makes him the purchaser of the entire of the wife's fortune.

<sup>c</sup> *Salwey v. Salwey*, Amb. 692.  
<sup>d</sup> *Druce v. Dennison*, 6 Ves. 395.  
<sup>e</sup> *Carr v. Taylor*, 10 Ves. 578.

<sup>d</sup> *Adams v. Pierce*, 3 P. Wms. 11.  
<sup>e</sup> *March v. Head*, 3 Atk. 370.

*Tomkyns v. Ladbroke*, 2 Ves. sen. 591.  
<sup>f</sup> *Elibank v. Montolieu*, 5 Ves. 737.  
<sup>e</sup> *Carr v. Taylor*, 10 Ves. 574.

<sup>e</sup> 2 Vern. 501.  
<sup>f</sup> 3 P. Wms. 199.

generally than the cases seem to warrant, for he says, "it is to be observed, that in all cases, where a husband makes a settlement of his own estate on his wife, in consideration of her fortune, the wife's portion, though consisting of choses in action, and though there be no particular agreement for that purpose, is looked on as purchased by him, and will go to his executors." But the rule which Mr. Raithby extracts from the cases is this;<sup>g</sup> "that choses in action, though there be a settlement, shall not pass to the husband as a purchaser, unless there be a special agreement, except so far as the settlement be equivalent to the portion." And this seems to be the true result of the authorities.

Wife barred of her equity by settlement, expressed to be in consideration of wife's portion at the time, and of her future fortune,

Inadequate settlement will bar wife's equity, if expressed to be the purchase of her entire fortune.

Settlement in consideration of part of wife's fortune, does not bar her equity out of the remainder.

The husband may also make himself the purchaser of the entire of his wife's choses in action by a settlement in which an agreement to that effect is expressed. As, if it is declared to be in consideration of such portion as the intended wife is entitled to at the time of the marriage, or may be entitled to during it, the husband is considered as the purchaser of all her choses in action, so that if there be any accession to her fortune during the coverture, the wife will not be entitled to an additional provision out of any part of it.<sup>i</sup> And even an inadequate settlement will entitle the husband to the entire of his wife's choses in action, if the instrument expresses such to be the agreement of the parties.<sup>j</sup>

to be the purchase of her entire fortune.

If, however, the settlement should be expressed to be in consideration of a part only of the wife's portion, the construction of it will be, that it is a purchase of that part only, and the remainder, if it consist of equitable choses in action, will be liable to her equity,<sup>k</sup> during the husband's life; and, if he die without having reduced that remainder into

<sup>g</sup> In his note to *Blois v. Lady Hereford*, 2 Vern. 501.

<sup>h</sup> *Druce v. Dannison*, 6 Ves. 396.  
*Carr v. Taylor*, 10 Ves. 579.

<sup>i</sup> *Garforth v. Bradley*, 2 Ves. sen. 677.

<sup>j</sup> *Adams v. Cole*, Forest, 168.

<sup>k</sup> *Burdon v. Dean*, 2 Ves. jun. 609.

possession, whether it consist of legal or equitable choses in action, it will survive to her. As in *Cleland v. Cleland*,<sup>1</sup> where the settlement was stated to be in consideration of 100*l.*, being part of the wife's fortune, which amounted to 300*l.*, secured to her by her brother's bond. The husband died indebted by bond in several sums, wherein he and his heir were bound. Actions having been brought against the heir, to subject the real estate descended to the payment of these debts, he brought this bill against the wife, as administratrix of her husband, to have the remaining 200*l.* of the fortune, which was unpaid, applied in discharge of these debts.

The Master of the Rolls decreed the 200*l.* to be applied towards payment of the husband's debts, and said it was natural equity it should be so. An appeal was afterwards brought from this decree before the Lord Chancellor; and he was of opinion, that "unless there was an agreement that the husband should have the other 200*l.*, it survived to the wife; and therefore directed it to be tried, whether there were any such agreement or no. But if the settlement had been in consideration of the whole portion, and had been equivalent to it, that would have amounted to an agreement that the husband should have it."

Although this case was decided only on the right of survivorship in the wife to a legal chose in action, of which the husband was not a purchaser by the settlement made upon her, yet it proves this also, that a similar settlement would not render the husband a purchaser of her equitable choses in action, or any other equitable property to which she was entitled, either at the time of her marriage, or which should accrue to her during her marriage, and therefore would be no bar to her equity out of such interests. For if a settlement so framed would not amount to a purchase of the wife's choses in action, so as to bar her right of survivorship after her husband's death, neither would it be a bar to

<sup>1</sup> *Cleland v. Cleland*, Prec. Chan. 63.

her right to a provision during his lifetime out of any part of her equitable estate.

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of remain-  
der.

But *Burdon v. Dean*,<sup>m</sup> is a direct authority to prove, that if the settlement be expressed to be in consideration of a part only of the fortune to which she is entitled at the time of her marriage, then she is not barred of her equity out of the remaining part, and that the husband must make an additional provision for her, before he will be allowed to reduce such remainder into possession. In that case, William Blastock, in consideration of 500*l.*, part of his wife's fortune, settled 500*l.*, another part of her fortune, upon her for her separate use, without taking notice of other property to which she was entitled. Blastock afterwards was declared a bankrupt, and his assignees filed their bill, praying to be declared entitled, during the joint lives of the bankrupt and his wife, to the income of one moiety of the freehold, leasehold, and personal estate, to which Mrs. Blastock was entitled under the will of her father, for her life, and also to such estate and interest as the bankrupt was entitled to in right of his wife, as tenant by the curtesy, and the income thereof, and an account of the arrears. The bankrupt and his wife, by their answer, stating that they had nine children, four of whom were living, claimed some further provision for the wife. This property was vested in trustees. The Master of the Rolls said, "That as to all personal property of the wife, which the husband is not authorized by law to reduce into possession, but must come here for, he must either show himself a purchaser, or make some provision for her out of it; otherwise the Court will not give it to him. I do not know that they will give it to the wife. The next question is, whether the wife, having, when *sui juris*, and before marriage, made a stipulation to secure what she thought fit for a certain portion, has ever been permitted to come here and require more. I admit a new equity arises upon property newly acquired." But on the next day his



Honour said, "I am of opinion that the settlement has not barred the wife." He then referred it to the Master, that they might lay proposals before him.

This is the only case decided directly on the right of the wife to an additional provision out of her equitable interests, to which she was entitled at the time of her marriage, where there was a settlement not comprehending that property; but there are many determinations establishing her right to an additional provision out of such interests arising to her subsequent to the marriage, although there had been a previous settlement in consideration of her fortune; and all these decisions seem to unite in fixing this rule, that a settlement, expressed to be in consideration of the wife's fortune, is confined to the fortune which she has at the time, unless it be expressed to comprehend future accessions, or the contents of the settlement plainly import such an intent.

In *Adams v. Pierce*,<sup>n</sup> the trustees of two married women filed their bill against them and their husbands, praying that the husbands might be obliged to make additional settlements, in consideration of the increase of their wives' portions; and though the Court gave the addition of fortune to the husbands, without insisting on any further provision, yet they recognised the right to insist on an addition of provision on an addition of fortune, though there had been a settlement on the marriage. In *March v. Head*,<sup>o</sup> the wife applied against her husband, from whom she lived separate, for a further provision on an addition to her fortune. Her fortune, on her marriage, was 1000*l.*, and the only provision made for her by her husband was a covenant that he would consider himself as a freeman of London, and if she survived him she should have such share of his personal estate as belongs to the widow of a freeman. On the death of her father and mother, she became entitled to 1800*l.* more. The Lord Chancellor said, "This Court, according to the power it exercises, and the care that it always takes of the interest of *femes covert*, will either,

Settlement in consideration of wife's portion, does not bar her equity out of an accession during marriage.

Inadequate settlement no bar to wife's equity out of accession of fortune.

Inade-  
quate set-  
tlement no  
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wife's  
equity out  
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sion of for-  
tune.

where there is no provision at all for the wife, on money coming to her, oblige the husband, before he is permitted to touch it, to make some provision for her, or where there is a slender provision only made before, on an accession of fortune to the wife, if it be considerable, (not if a trifle only,) oblige the husband to make a further provision." This case shows, that an inadequate settlement before marriage, does not prevent the wife's equity to a provision out of an addition to her fortune, consisting of equitable interests, after marriage. And *Tomkyns v. Ladbroke*<sup>p</sup> is to the same effect, for there the wife's father had made a settlement upon her for her separate use; and Lord Hardwicke said, that should not prevent, on an accession of fortune, a provision by the husband; for that there were several cases where there are settlements by husband on his wife, and before marriage, yet where there was a great accession of fortune, the Court will not suffer the husband to exhaust great part of his wife's fortune, notwithstanding those other settlements before. In *Garforth v. Bradly*,<sup>q</sup> his Lordship laid down the rule with respect to accession of fortune after the marriage to be, that if the settlement on the wife is in consideration of her present portion or fortune, without reference to what comes afterwards, and the husband does not reduce it into possession, it will survive to the wife in equity as well as at law; and it follows from this rule, that if the husband sought to reduce that additional fortune into possession during the marriage, he could not have it without making an additional provision.

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So, also, in *Lady Elibank v. Montolieu*,<sup>r</sup> a further provision, in consequence of an addition to her fortune, was decreed to the wife, on whom a settlement had been made before marriage. The facts were these: Lady Elibank was entitled, as one of the next of kin of Lady Cranstown, to a share of her personal property, and she, by her next friend, filed a bill against Lord Elibank, her husband, and Lewis Montolieu, who had taken out letters of administration to

Lady Cranstown, in which she prayed an account of her share, and that it might be settled on her and her family. And it was decreed, that the distributive share of Lady Cranstown's fortune, accruing to the plaintiff, as one of her next of kin, was subject to a further provision in favour of the wife and her children, the settlement upon her marriage not being adequate even to the fortune she then possessed ; and it was directed that the Master, in framing the settlement, should have regard to the extent of her fortune, and the settlement already made upon her. The Chancellor, in pronouncing his judgment, said, that the difficulty he had was upon the form of the suit, whether a married woman, by her next friend, could be plaintiff in this court ; that as to that objection, it did not weigh much if she had a claim, and had no other way of enforcing it but by a bill ; that the natural way would have been for the defendant, the administrator, to have come before the Court as plaintiff, desiring the Court to dispose of the fund, and for her benefit to protect her interest in it ; and that if he had done so, the Court would not have suffered this money to be paid to Lord Elibank without making a provision for her, for the provision upon her marriage was clearly not adequate to her fortune.

But if the settlement not only is not expressed to be in consideration of the future accessions to the wife's fortune, but states the consideration to be her fortune as it should be at the time of the marriage, then of course it is not a purchase of any addition, and the wife is entitled to her equity out of it. As in *Carr v. Taylor*,\* where the settlement of George Carr was expressed to be in consideration of the portion of fortune which her would have or receive upon his marriage with Maria Taylor, and for making some provision for the said Maria Taylor and the issue of the marriage, &c. &c. After the marriage, Mrs. Carr became entitled, as one of the next of kin of William Taylor, deceased, to a share of the residue of his personal estate under

Settlement expressed to be in consideration of fortune at the time of the marriage, no bar to wife's equity out of accession to her fortune.

the statute of distributions. George Carr became a bankrupt shortly afterwards, and the bill was filed by Mrs. Carr, praying that her share in the residue of William Taylor's personal estate may be secured for the benefit of the plaintiff during her life, and of her children after her death. The assignees under the commission claimed the share of the intestate's estate, to which the bankrupt became entitled in right of his wife, on the ground of the settlement, and the proof made, and the dividend received in respect of it under the commission. Sir William Grant said, "The doubt in this case is, whether the husband ought to be considered a purchaser of the whole fortune of his wife, or only of that which he was actually to receive with her at the marriage. If he was a purchaser of the whole, she is not entitled to any provision out of what has since accrued ; if he was not a purchaser of the whole, she will by the rule of this court be entitled to an additional provision out of that additional fortune. The rule is established, that to make the husband a purchaser of the whole, the settlement must either express or clearly import that intention ; and the meaning seems to be, that the husband should take only what was to become his immediately on the marriage." His Honour then decreed an account to ascertain the plaintiff's share, and that the assignees should make a provision for an adequate settlement out of that share, having regard to the settlement already made upon her.

Thus it appears, that a husband does not, by making a settlement on his wife, necessarily become the purchaser of all her present and future fortune ; that, if the settlement be in consideration of part of her portion, it makes him the purchaser of that part only, and leaves the remainder subject to her equity, and to her chance of survivorship ; and that if it be expressed to be in consideration of the entire fortune which she then has, her future accessions are unaffected by it, and he cannot reduce them into possession without making an additional settlement upon her, if they are equitable, and if he die without having possessed himself of them, if they are choses in action, whether they

are legal or equitable; they survive to her; but if the settlement is expressed to be in consideration of such portion as the intended wife is entitled to at the time of the marriage, or may be entitled to during it, then, if there be any future accession to her fortune during the coverture, he is considered as a purchaser of it, and the wife has no right to an additional provision out of any part of it.<sup>t</sup>

The result of all these cases seems to be this, that a wife is not barred, by a settlement on her marriage, of her equity in respect of the equitable interests to which she was entitled at that time, unless that settlement either expresses that the husband is the purchaser of them, or it clearly imports it by its adequacy; and that, though the settlement should be so expressed, or be in its provisions adequate to the portion to which she is then entitled, she is not barred of her equity out of the equitable interests which accrue to her during the marriage, unless either the settlement is expressed to be the purchase of such accessions, or it be fully adequate to them.

- But even though the husband should have bound himself by articles previous to his marriage, to make a settlement on his wife, which, either by its value, or the express terms of it, would be deemed the purchase of the entire portion which she then had, or afterwards might have, still it would not bar her equity, nor would the husband, or his representative, or his assignee, have the assistance of the Court to reduce it into possession, unless the husband had first completed his marriage contract, by making the settlement which he had covenanted to execute. As in *Howman v. Corie*,<sup>u</sup> where the father had devised 400*l.* to his daughter, charged on certain lands which he devised to her, until his eldest son should pay her the money. On the marriage of the daughter, the husband's father covenanted to settle 100*l.* *per annum* on husband and wife for their present maintenance and for her jointure; and the wife's brother, who was in possession of the lands, covenanted to pay the hus-

Articles previous to marriage, not completed by the husband, no bar to wife's equity.

<sup>t</sup> *Garforth v. Bradly*, 2 Ves. sen. 677.

<sup>u</sup> 2 Vern. 190.

Marriage agreement not carried into execution by the husband, does not bar wife's equity.

band the 400*l*. The father was unable to settle the 100*l*. *per annum*, and the brother did not pay the money, but died, devising the lands to the husband and to another for payment of his debts. The husband accepted of the trust, and died without having raised the money ; and the bill was filed by the wife claiming the 400*l*. And the question was, whether the portion should survive to her, or whether, by the marriage articles, it was not so vested in the husband as that it should go to his administrator ? It was argued for the wife, that the covenant from her brother was but an additional security, and did not change the nature of the debt, but was still continued a charge upon the land, and as a chose in action it survived to the wife, although it was agreed that the husband, during the coverture, might have released or discharged it ; and the Court was of that opinion, and decreed it for the wife. So that, though there had been an agreement to make a settlement in consideration of the wife's fortune, and though the husband had taken a new security for that fortune, for which, as appears by the register's book, the brother paid interest to him for some time after the marriage, yet the agreement not having been completed, and the money not having been paid, it was held to survive.

And even if the agreement had been in consideration of a portion to settle, not only on the wife but on the children of the marriage, still it seems that the wife would have been held entitled, even against the children, to the portion in the hands of trustees, unless the agreement were performed.

Agreement on marriage to settle on wife and children in consideration of portion, no bar to wife's equity, if

This was decided in the case of *Pyke v. Pyke*,<sup>v</sup> where, previous to the marriage of J. Pyke, articles were entered into, by which he agreed to settle an estate in Ireland, first, on his intended wife as a jointure, and afterwards part thereof to secure the portion of younger children, and then the whole upon the first and every other son in tail ; and that the wife's portion should remain in the hands of the

trustees, till the settlement should be executed. It was also agreed, that the portion should be applied in discharging the incumbrances affecting the estate, and that the overplus should be paid to J. Pyke, his executors and administrators. The marriage was had, and the husband afterwards died, without having made any settlement. The bill was filed by the wife, for the payment of this part of the residue of her father's personal estate, which was in the hands of his executor, as the right thereto survived to her upon her husband's death. It was admitted on all sides, that no settlement could now be made; but the children of the marriage insisted, notwithstanding, on being purchasers under these articles, and that they were equally entitled with their mother to have the benefit of them, although no settlement had been made. Lord Hardwicke said, "He was of opinion, that the children, under the circumstances, were not entitled, and that no court of justice could take this portion out of the hands of the mother, or of her trustees, who are the representatives of her father, unless she had that part of the settlement agreed for her benefit made good to her; that it would be strange that the legal right to the portion in the hands of the wife should be taken from her, and she not to have the benefit of the other side; that it arose from the fraud and misbehaviour of the father of the children; that the mother had as good an equity as themselves, and had the law of the land on her side; that then they were purchasers in equal degree; and that the children have not a right to come against the mother to make good that failure on the part of the father; that there was no instance, where one right was entire, as the mother's portion was, and in her own hands, that the Court would take it from her, unless she has what was stipulated for. That legal right, therefore, which the mother has gained by surviving her husband, ought to prevail."

the agreement be not executed by the husband.

The same principle was laid down by Sir William Grant in *Mitford v. Mitford*,<sup>w</sup> where his Honour held, that while

Agreement on marriage no

bar of  
wife's equi-  
ty, unless  
the agree-  
ment be  
performed.

the obligations of the husband remained unperformed, neither he, nor any person claiming under him, could be permitted to receive any portion of his wife's fortune, upon any other condition than that of making good the settlement. These are cases in which the question of survivorship arose after the death of the husband; but, it is equally clear, that if the husband, in his lifetime, had sought to reduce the wife's equitable choses in action into possession under such circumstances, either he would have been bound to perform his contract, or she would have been held entitled to a provision out of this property, before he would be permitted to receive it; but if the husband covenant to make an additional settlement on receiving or becoming entitled to any further money in right of his wife, and after his death the wife becomes entitled to an additional fortune, it has been decided, that the husband is not so far a purchaser of this money as to entitle his creditors after his death to take it from the wife; and, on the other hand, that the wife has no right to compel the remainder-man to make an additional settlement upon her on account of this accession.<sup>x</sup> However, if the time for performing the marriage agreement have not arrived, the husband, or his assignee, may take the wife's portion, which was the consideration of the contract, without interruption.<sup>y</sup>

<sup>x</sup> Holt v. Holt, 2 P. Wms. 648.

<sup>y</sup> Basevi v. Serra, 14 Ves. 313. 3 Mer. 674.



## CHAP. VI.

OF THE WIFE'S POWER OF WAIVING HER EQUITY, AND  
EXCLUDING HER CHILDREN FROM ANY SHARE IN IT.

It has been stated in a former part of this book,<sup>a</sup> that a provision is always secured to the children whenever the wife's claim to her equity is allowed. *Johnson v. Johnson*,<sup>b</sup> is the single exception to this rule: In this case, the husband assigned to his creditors a sum of money standing in the name of the Accountant-General, in trust in this cause, to which he was entitled in right of his wife, and the Court ordered, on a petition of the creditors for a transfer, (the wife being examined, and consenting,) that part of the fund, 219*l.* 15*s.* 1*d.* should be transferred to them, and the remaining 250*l.* should continue in the Accountant-General's name, the interest thereof to be paid to the wife for her separate use for life, and on her death, any persons entitled to said sum were to be at liberty to apply for the same, as they should be advised. It appears that in this order there was no direction for a provision for the children. After the death of the husband and wife, a petition was presented by their son, praying a transfer of this sum, on the ground that the settlement on the wife, his mother, ought to have included the children; but the Master of the Rolls held, that the order, which he admitted to have been an unusual one, having been acquiesced in for so many years, it was quite impossible to set it aside now. His Honour said, "The Court ought to have referred it to the Master to approve of a proper settlement, instead of making this order; but that was at least thirty-four years ago, and it cannot now be altered." So that this decision does not

A provision is always secured for the children, when the wife's equity is allowed.

Exception.

<sup>a</sup> Chap. I.

<sup>b</sup> 1 Jac. & Walk. 472.

The children must be included in an order for the wife's equity, and she cannot, under this order, accept a provision for herself alone.

Wife may refuse a provision for her equity, to the exclusion of her children.

If a proposal for a settlement be once made by the husband, the wife cannot renounce to the exclusion of her children.

Wife may waive her equity before an order of reference to the Master.

affect the rule, the application having been refused on the ground of long acquiescence in an order confessedly erroneous. In fact, with the exception of the order made in the above mentioned case, the rule of the Court in cases of this kind uniformly has been, that a proposal shall be laid before the Master for a settlement both on the wife and her children; and if the wife should accept of a provision under that order, she cannot take it for herself alone, but her issue must be included in that arrangement.

However, although the wife will not be permitted to take this provision for herself to the exclusion of her children, yet she has a right, if she thinks proper, to refuse a provision, and to relinquish her claim to it in favour of her husband, by which means she bars not only herself of her equity, but her children also of any participation in it; and she may renounce this advantage for herself, and deprive her children of any share in it, at any time before the husband has made a proposal for a settlement, in pursuance of the decree or order of the Court to that effect; but if he have once laid a proposal for a settlement before the Master, in obedience to an order of reference to him, her power of waiving the provision is at an end, and her children have acquired a vested interest in her equitable property, of which it is not competent to her to deprive them.

*Willats v. Cay*<sup>o</sup> is an instance of a waiver by the wife of her equity before any order was made for a settlement. There the sum of 1300*l.* was charged in trust, as a provision for a daughter, who afterwards married without the consent of her relations. It was insisted on by the counsel for the trustee, that the husband, who appeared to be an insolvent person, should find some method of securing the wife's money as a provision for her; but as he has neither real or personal estate of his own, he was incapable of doing it; and, therefore, it was proposed that it should be referred to the Master, to consider of a scheme for securing some provision for the wife, as has been done in cases of this

nature. The wife appearing in court, and being examined, desired that the whole 1300*l.* might be paid to the husband, without expecting any provision for herself; upon which his Honour refused to refer it to the Master, which, he said, was never done, unless circumstances of fraud appeared, or compulsion on the part of the husband; and that a wife may as well dispose of personal estate, over which she has an absolute control, as of real estate, by joining in a fine with her husband.

But Lord Hardwicke expressed a different opinion in *Ex parte Higham*,<sup>d</sup> where the husband petitioned that his wife's fortune, near 1000*l.*, should be paid out of the bank to him. They had been married about half a year; the wife was lately come of age, and being present in court, was very desirous it should be so; and the husband said he could make much more of it in the way of his trade of a trunkmaker, than to make any settlement of it on his family. The Lord Chancellor said, though he might do so, he might also spend it; and his Lordship would not suffer the whole to be paid to him, but let him have the greater part, the remaining 400*l.* to be settled on his wife and family.

From this case it would appear, that the Court, notwithstanding what had been said by the Master of the Rolls in *Willats v. Cay*,<sup>e</sup> sometimes exercises a discretionary power of withholding the wife's money from the husband, though she should consent that he should have it, and of insisting on a provision for her and her children, though she should expressly waive it. However, as the wife, in this latter case, had been married under age, and as no settlement had been made upon her; and as this order was such as the Court usually makes where its female ward has been married clandestinely, it is likely that the husband was in contempt for the marriage, which would reconcile the cases, and account for the refusal of the Court to abide by the consent of the wife; and this conjecture is rendered more probable by an anonymous case,<sup>f</sup> which was decided by his

The Court will sometimes insist on a provision for the wife, although she consent in court to waive it.

d 2 Ves. sen. 579.

e 2 Atk. 67.

f 2 Ves. sen. 671.

Wife cannot waive her equity after a proposal for a settlement on her and her children by the husband, even where there are no children.

Lordship in the following year, in which he refused to give the husband the wife's money without a settlement on the wife and children, though she consented that her husband should have it; and his Lordship put the refusal, not upon the right of the Court to refuse, though the wife should consent, but upon the circumstance of the husband having made a proposal for a settlement before that time. In this case his Lordship held, that the wife could not waive her equity after a proposal, for that the mere proposal by the husband for a settlement on his wife and children, out of her property, was binding, although there were no children of the marriage. Here, Mr. Gardiner and his wife petitioned that her personal estate, amounting to about 3000*l.*, should be paid to him out of Court, the wife present in Court, consenting, and desiring to have it so, as most advantageous to them. On the intermarriage of the petitioners, application had been made to the Court to take care of this money, and that the husband should make a proper settlement, for which it was referred to the Master, before whom proposals were given in and signed both by husband and wife, by which he was to settle an estate in Jamaica in strict settlement; but before it was actually concluded on, they went to Jamaica, where they stayed six years, and now preferred this petition, there being no children living, and insisted on not being bound by the proposal, the wife saying that she would be content with her dower; but the Lord Chancellor would not grant it. He said, though the wife might give up her interest in this money if she pleased, yet nobody could consent for the children which may be. The proposal was binding, and if the husband had died before he came home, and had left children, under these articles there would be a right to have it carried into execution; and the Court has laid hold of a circumstance much less strong than so formal an agreement as this was, to refuse what was desired.

Wife cannot waive her equity after a pro-

And, according to this decision, it seems to be now the settled rule of the Court, that the wife may waive her equity at any time before a proposal has been made by the hus-

band ; but that she cannot give up her right to her husband, so as to bar her children, after the order for a settlement has been completed ;<sup>g</sup> for the moment the husband's proposal for a settlement has been made to the Master, (which seems to be the completion of the order,) the wife's power of waiving her equity is at an end, and her children have a vested interest in it, of which their mother cannot deprive them.

posals for a settlement made to the Master by the husband.

.But although the wife may surrender her equity, and consent that her money should be given to her husband, after an order has been made by the Court for a settlement upon her and the children of the marriage, and before a proposal has been made by the husband ; yet if she die after the order, leaving children, and before the husband has proposed, and before any waiver by her of her equity, that order will bind the husband, and the children will be entitled to a settlement under it. And so it was ruled by Lord Thurlow in the case of *Rome v. Jackson*.<sup>h</sup> There, upon an application to the Court for payment of a wife's legacy, the usual order was made for the husband to go before the Master, and submit proposals to him for a settlement on his wife. Before proposals were laid before the Master, the wife died, and the husband applied for his wife's legacy. The Lord Chancellor (Thurlow) said, " If there be an order, directing a husband to go before the Master, and to lay proposals before him for a settlement on his wife, and the issue of the marriage, and the wife dies, leaving children, this Court will not part with the property, but keep the husband to the order." And his Lordship added, that in this case there were children, and therefore he directed the husband to go before the Master and prosecute the order. So, in *Martin v. Mitchell*, which was cited in *Murray v. Lord Elibank*,<sup>i</sup> the Court, after the death of the wife, subsequent to the order for a proposal, and before a settlement, directed the husband to execute the order for a proposal. In this case, a decree was made for an account,

If wife die after an order for a settlement made, the children have a vested interest in their mother's equity, though no proposal had been made by the husband.

<sup>g</sup> *Murray v. Lord Elibank*, 10 Ves. 88.

<sup>h</sup> 2 Dick. 604.  
<sup>i</sup> 10 Ves. 89.

The order for a settlement vests a right in the issue to a provision, though their mother die before a proposal made.

and that what should be found due to Hannah Fearn's should be paid into Court to her separate account, with the usual directions for a settlement. The sum of 3000*l.* was, by the report, stated to be due, and was carried over. After her death, it was moved that this money should be paid to the husband, and the motion was refused ; but an order was made, directing the husband to go before the Master and execute the order for a proposal : and such was held to be the practice in *Murray v. Lord Elibank*,<sup>j</sup> where a supplemental bill was filed by the children of Lady Elibank, praying the benefit of a decree obtained by their mother, for a settlement on herself and the plaintiffs, out of an additional fortune which accrued to her after marriage. Lady Elibank had died since that decree, and before the settlement was completed, and before any proposal made. This bill was demurred to, on the ground that the present plaintiffs were no parties before the Court when that decree was pronounced ; that they had no more interest in the property than a stranger ; but were considered by the Court as comprehended in the mother, while she exists, who is therefore allowed to extend her plan of provision to them, but not as distinct and separate objects, having an interest independent of her ; that the proposal, not completed and carried into execution by the Court, is only an offer ; and if the wife should die before it is carried into execution, the husband is remitted to his legal right. In all these cases every thing is given with reference to the wife, nothing independent of her. The Lord Chancellor said, " The question is, what is the effect of such an order, as constituting a right in the issue to a provision, if the wife die without any act done after the date of that order. If this case had been antecedent to the period when the manuscript case,<sup>k</sup> alluded to by Mr. Maddocks, was decided, it would have been very difficult, consistently with what the Court does with the wife's property, to say there was such a right as is now asserted, upon a proceeding

<sup>j</sup> 10 Ves. 84.

<sup>k</sup> *Rowe v. Jackson*, 2 Dick. 604.

that went no farther than an order to lay a proposal before the Master." His Lordship then proceeded to state the reasons against such a rule, but concluded by observing, that "taking all this together, however numerous the difficulties upon it, it is too much for me to say upon the argument, all that has been done in the cases referred to is to go for nothing; because it is difficult to say, *ab ante*, it should be done, and that I am to set up a different course of practice." And his Lordship added, "that the principle of the decision must be, that the wife obtained a judgment for the children, liable to be waived, if she thought proper, otherwise to be left standing for their benefit at her death." And the demurrer was overruled.

By this decision, which has not been appealed from or contradicted, the rule is now established, that if the wife obtain an order for a settlement on herself and her children, and die before any further proceeding upon it, the children have an interest in that order, which they may enforce, and of which they cannot be deprived. That order is a decree obtained by their mother for them, not conferring an indefeasible interest upon them during her life, but giving to her a power of permitting such an interest to devolve on them out of her own fortune after her death.

So, too, where the assignees of the bankrupt husband entered into an agreement to take only part of the wife's legacy, and in consideration of such part, to settle the remainder on her and her children; it was held, that though the wife afterwards died, and no settlement was made, the children were entitled under the contract. This was the case of *Lloyd v. Williams*,<sup>1</sup> where a legacy of 500*l.* had been bequeathed to Mary Lloyd by David Jones. Mary, the legatee, afterwards married David Johnstone, one of the defendants, who, subsequent to the marriage, became bankrupt. An agreement was then entered into between his assignees and Jones' executor, whereby, in consideration of 140*l.* to be paid to the assignees, a settlement was to be

An agreement by the assignees of bankrupt to make a settlement on wife and children, vests a right in the children, though their mother die before the settlement made.

<sup>1</sup> 1 Mad. C. C. 450.

made upon Mary Johnstone and her children out of the legacy of 500*l.*, and a release was accordingly executed by the assignees to the executor of the remaining 360*l.*, but no settlement was executed. Mary Johnstone, the legatee, afterwards died, leaving one child, a daughter. The bill was filed by some of the legatees against the surviving executor of Jones, and against others, praying an account, and that their respective rights might be ascertained. The husband by his answer claimed the balance of the legacy of 500*l.*, and the daughter claimed to be entitled to all such interest as she would have had, if a settlement had been made. The Vice-Chancellor, Sir Thomas Plumer, was of opinion, that by this contract between the executor and the assignees, the executor became a trustee for the wife and children, as to so much of the legacy as was given up by the assignees, and that he had no option, but might have been compelled to settle it on the wife and children, and that the death of the mother could not disappoint the claim of the child.

If the father die after an order for a settlement, but before a proposal, the children have no claim.

But though the children have a right to a settlement after a decree to that effect, if their mother should die without having waived it, yet, if the father should die after decree or order without having made a proposal for a settlement before the Master, then it seems that the children would have no right to any share in the fund, but that it would vest absolutely in their mother by survivorship,<sup>m</sup> so far as it consisted of choses in action.

There is, however, a dictum of Lord Alvanley, which seems to be adverse to this rule, that the equity of the wife, after an order for a settlement in her lifetime, survives to her children after her death; for, in *Macaulay v. Philips*,<sup>n</sup> his Lordship says, that if a proposal be made for a settlement, and the wife die before it has been approved of by the Court, the husband would be entitled to her choses in action, discharged of the terms of his proposal. But it is to be observed of this dictum, that the question before his

<sup>m</sup> Phipps v. Lord Anglesea, 1 Fonblanque, 89.  
<sup>n</sup> 4 Ves. 19.



Honour was between the representatives of the husband and the wife, where he had made a proposal for a settlement in his lifetime, there being no children of the marriage; which latter circumstance distinguishes the cases, and shows that the only opinion his Honour meant to convey was, that the mere fact of the husband having made a proposal did not destroy the right of survivorship that exists between husband and wife as to her choses in action.

The result of the cases on this subject seems to be this : that the children are entitled to a share of their mother's equity, unless she thinks proper to deprive them of it, by waiving her own, but that she cannot accept a provision for herself and exclude them ; that she may waive her equity at any time before the husband has made a proposal for a settlement to the Master, but not afterwards ; and that if there be a decree or order for a settlement on her and her children, or an agreement on her part with her husband or his assignees for a settlement in consideration of her waiving her equity, and if she die without having relinquished the decree or order in the one case, or the agreement in the other, the benefit of them will survive to the children, and the husband cannot deprive them of it : and that, on the other hand, if the husband die after an order only, without any proposal having been made by him, the fund, if it consist of choses in action, will survive absolutely to the wife, though she should have issue of the marriage then living.

## CHAP. VII.

**OF THE RIGHT OF THE CHILDREN AFTER THEIR MOTHER'S DEATH TO A PROVISION OUT OF HER UNSETTLED EQUITABLE PORTION, WHERE THERE HAS BEEN NO ORDER FOR A SETTLEMENT ON THEM DURING HER LIFE.**

BUT although the children must be comprehended in any arrangement for a provision arising from the wife's equity in her lifetime, yet the cases, as reported, render it doubtful whether a claim of this nature on their part would be allowed after their mother's death, if there had not been an order or an agreement for a settlement upon them during her life. According to these reports, the opinions of very eminent judges are at variance on this question, some holding that the children, after the death of their mother, have an original equity of their own, distinct and independent of her, and that the husband cannot have the assistance of the Court to get the possession of his wife's equitable assets, without first securing a provision for her children out of them; while, on the other hand, it is contended, that this claim is personal, and peculiar to the wife; that if it have not been put forward and acted on in her lifetime, it dies with her, and does not survive and descend to her children.

In *Wytham v. Clawthorn*,<sup>a</sup> a husband, as administrator to his wife, by whom he had a son, filed a bill against the trustees to raise her portion, and the money was decreed to be raised and put out for his benefit for his life, then to the son for life, and if he leave issue, then for such issue; but if he die without issue, and the father survive him, he to have it. In this case, the Court seems to have considered

<sup>a</sup> 2 Eq. Ab. 392.

the child of the marriage to be entitled to an equity out of his mother's portion after her death. So Lord Chancellor King is said to have decreed in favour of the children's equity in the case of *Grosvenor v. Lane*. That decree has not been reported, but the same case having been afterwards before Lord Hardwicke, in a subsequent stage of it,<sup>b</sup> his Lordship mentioned this decision of Lord Chancellor King, in which he had yielded to this claim, and had ordered a provision for an infant daughter (her mother having died) before he would permit the husband to take his wife's fortune. So, in *Scriven v. Tapley*,<sup>c</sup> Sir Thomas Clarke, Master of the Rolls, decreed a provision to the children after the death of their mother, although no order had been made in her lifetime for a settlement upon them. And although this decree was reversed by Lord Northington on an appeal,<sup>d</sup> yet Sir Thomas Sewell, Master of the Rolls, in a short time afterwards, adopted the opinion of Sir Thomas Clarke, and acted upon it; for, in *Cockel v. Phipps*,<sup>e</sup> where the bill was filed by the plaintiff, praying to be decreed entitled to a sum of 500*l.* in right of his wife, who was then dead; his Honour, although he held the husband to be entitled to this money, would not suffer it to be paid to him until the Master should report whether he had made any provision for the issue of his marriage with his late wife.

Instances in which children were held to have an independent equity to a provision out of their mother's equitable interests after her death.

There is, in addition to these decisions, the weight of Sir William Grant's opinion in favour of this right in the children; for his Honour, speaking of the above cases, says, "There is, therefore, a great deal of authority in opposition to that decision by Lord Northington, in *Scriven v. Tapley*,<sup>f</sup> all weighing strongly in favour of the right of the children claiming under a decree in favour of their mother; for if their right to come with an original demand for a settlement upon them, their mother having died without

<sup>b</sup> 2 Atk. 180.

<sup>c</sup> Amb. 509. 2 Eden's C. C. 337.

<sup>d</sup> Ibid.

<sup>e</sup> 1 Dick. 391.

<sup>f</sup> Amb. 509. 2 Eden's C. C. 337.

demanding any settlement, is established, *à fortiori*, if she has claimed, and the Court has directed a settlement, the children must be entitled.<sup>g</sup>

These are the cases in favour of the children's independent equity. On the other side, in *Hearle v. Greenbank*,<sup>h</sup> Lord Hardwicke said, that he could find no case where the Court had refused to suffer the assignees of a bankrupt husband, after the death of his wife, to lay their hands on her fortune, without making a provision for the children. And Lord Northington made the same observation with respect to the husband himself, when he reversed Sir Thomas Clarke's decree in *Scriven v. Tapley*.<sup>i</sup> The case there was, that the wife being entitled to a sum of money, died in the lifetime of her husband, leaving one child, who filed a bill to raise the mother's portion; and the question was, whether the husband had a right to this money without making a settlement on the children? The Lord Chancellor said, "The equity of compelling settlements first arose upon the husband's coming into this Court for assistance. It is personal to the wife, and, if carried further, would be attended with ill consequences to creditors. There is no case where the Court has refused assistance to the husband, after the death of the wife, upon the terms of his making a provision for the children."

The equity of the wife to compel a settlement is personal to her.

But Lord Eldon seems to have decided this question against the original claim of the children in the case of *Murray v. Lord Elibank*,<sup>j</sup> where his Lordship determined, that an order for a settlement on the wife and her children, constitutes a right in the children to a provision, if the wife die without any act done after the date of that order. This case was argued very much at length, and his Lordship expressed some difficulty in giving his judgment upon it. But surely there could have been no difficulty in saying, that an order for a settlement on the wife and her children, without any further proceeding, should establish

<sup>g</sup> *Murray v. Lord Elibank*, 13 Ves. 8.  
<sup>h</sup> 3 Atk. 717.

<sup>i</sup> Amb. 509. 2 Eden's C. C. 337.  
<sup>j</sup> 10 Ves. 84.

a right in the children to a provision after their mother's death, if his Lordship had been of opinion, that the children would have had such a right without any order. If the children had a right to a provision after their mother's death, without any decree or order having been pronounced for a settlement on them in her lifetime, then it would follow *à fortiori*, that they must have the same right, if there had been an order for a settlement in her lifetime. But it is remarkable, that Lord Eldon never once adverts, in the whole course of his judgment, to an equity in the children after their mother's death, independent of any order for a settlement on them during her life, although such a right was insisted on by their counsel ; so that his Lordship may be very fairly considered as having entertained sentiments adverse to that claim.

But the very point arose, and was decided by Sir Thomas Plumer, in the case of *Lloyd v. Williams*,<sup>k</sup> where it was held, that the children have no independent substantive right, and that their right can be derived only from a contract or under a decree. And the value of this very able judgment is considerably enhanced by the Vice-Chancellor's patient and laborious investigation of the cases on the authority of which the independent right of the children was rested ; for he showed distinctly from the Register's book, that two of them, which were principally relied on, namely, *Grosvenor v. Lane*,<sup>l</sup> and *Cockel v. Phipps*,<sup>m</sup> are misreported, and are no way applicable to this question. It appeared, that, in the first case, the portion of the mother was, after her death, decreed to her daughter, as being entitled to it under a deed executed by her father and mother, and not on the ground that she had an independent right to do it. And in *Cockel v. Phipps*,<sup>n</sup> where the husband filed a bill for part of his wife's fortune after her death, it was referred to the Master to inquire, whether he had made any settlement on the children, inasmuch as he had covenanted by his marriage articles to make such settlement. So that neither of

No independent right in the children, after their mother's death, to a provision out of her portion.

k 1 Mad. C. C. 450.  
l 2 Atk. 180.

m 1 Dickens, 391.  
n Ibid.

these cases is an authority upon this point ; and, therefore, the only authorities remaining in support of the children's right are the cases of *Wytham v. Camthorn*,<sup>o</sup> and of *Scriven v. Topley*,<sup>p</sup> as decided by Sir Thomas Clarke, if we except the opinion intimated by Sir William Grant in *Murray v. Elbank*,<sup>q</sup> and that, it must be observed, was given by his Honour on the supposition that *Grosvenor v. Lane* and *Cockel v. Phipps* were correctly reported.

But, without pretending to estimate the weight or value which ought to be attached to the different opinions upon this subject, it may be permitted to observe, that the wife's equity has been hitherto administered in such a way as seems to negative the idea of any right in the children after their mother's death, except as derived from her, through the medium of a decree or of a contract made in their favour in her lifetime. For the rule is established, that the wife may waive her equity in favour of her husband, and deprive herself and her children of any share in it, at any period before a proposal has been made by the husband for a settlement. How then is it possible to reconcile the notion of an equity in the children after the mother's death, not dependent upon her, while she possesses this power of barring their claim altogether, even though there should have been a decree for a settlement upon them ?

However, this is a question of mere practice, depending rather on the number than on the weight of the authorities ; and as the research of the Vice-Chancellor, in *Lloyd v. Williams*,<sup>r</sup> has reduced the number of those which were supposed to be in favour of the independent right of the children, and as this decision has added one to the number of those against it, it seems it may be now safely asserted to be the law of the Court, that the children have no right to a provision out of their mother's equitable portion after her death, unless there has been a decree or an agreement to that effect in her lifetime, of which she has not relinquished the benefit.

<sup>o</sup> 2 Eq. Ab. 392.

<sup>p</sup> Amb. 509. 2 Eden's C. C. 337. <sup>r</sup> Lloyd v. Williams, 1 Mad. C. C. 450.

<sup>q</sup> 13 Ves. 7.

<sup>s</sup> 1 Mad. C. C. 450.

## CHAP. VIII.

THE FORMS IN WHICH THE WIFE WAIVES HER  
EQUITY.

ALTHOUGH a married woman has an undoubted right to yield her claim upon her unsettled equitable portion in favour of her husband, without receiving any equivalent for it, yet it has been deemed expedient by the Court, to interpose certain forms in the exercise of that right, to guard her against the possibility of a constrained or hasty relinquishment of her interests. And, accordingly, it is the unvarying practice, that, whenever her consent is required to waive this equity, she must undergo an examination separate and apart from her husband, in which she is informed as to the nature and extent of the benefit she is about to surrender; and, at the same time, is apprized, that her free and voluntary consent is requisite to pass it. And, if she should evince any, the least disinclination to the transaction, or intimate that any force or threat had been employed to influence her on the occasion, the Court will refuse its assistance to the husband to reduce her portion into possession, unless he makes a settlement upon her. The act must be perfectly voluntary on her part, or the Court will not give it effect. Even where the husband is willing to make a provision for the wife out of her equitable portion, and has made a proposal to the Master for that purpose, which he has reported that he approves of, still, if the Court should deem the proposal ineligible, it is usual to examine her, to know from her if she consents.<sup>a</sup> And if she will consent freely and voluntarily, and if she perseveres in her consent, the Court will not prevent her, however

Wife  
waives her  
equity by  
her con-  
sent on  
her sepa-  
rate ex-  
amination  
in court.

<sup>a</sup> Macaulay v. Philips, 4 Ves. 18.

injurious to her interests, and notwithstanding any opposition.<sup>b</sup>

On application for wife's money, she must be examined separate and apart from her husband.

Return of commission.

Examination of wife by commissioners must be returned in writing, and signed by her.

When an application is made to the Court on the part of a married woman, for money in her own right to be given to her husband upon her consent, she must be examined as to her wishes respecting the surrender of her money. This examination of the wife, preparatory to the waiver of her equity, must take place, either before the Judge in whose court the cause is attached, or before commissioners specially appointed by that court for the purpose. If the wife be in town, she must be examined before the Court, and if she be abroad or in the country, a commission issues, directed to certain persons to examine her at the place of her abode ; but wherever the examination takes place, whether before the Court or elsewhere, it must be sole, and separate, and apart from the husband. When the examination is taken under a commission, the commissioners should examine the wife apart, and inquire from her in what manner and to what uses she was willing that the money mentioned in the order for her examination should be applied ; and they should also at the same time read that order to her, and explain its purport and effect. And in their return to the commission, they should certify that they had performed these requisites ; and also that the lady did, on her examination, say and declare, that she was willing and desirous that the money (specifying the amount) might and should be paid to her husband for his own use and benefit ; and that she did thereby freely and voluntarily consent that the same be paid to him accordingly.<sup>c</sup> The examination also of the wife must be returned in writing, and signed by her, containing her deposition to the same effect ; and her signature to it, as well as the signatures of the commissioners, must be proved by affidavit. And if the return of the commissioners be less full and particular than as above stated, it seems that it

<sup>b</sup> Dimmock v. Atkinson, 3 Br. C. C. 195. Wright v. Rutter, 2 Ves. jun. 673. <sup>c</sup> Tasburgh's case, 1 Ves. & Beames, 507.



would be deemed to be insufficient, for, in a late case,<sup>d</sup> where the commissioners certified nothing more than that the married lady had attended them, and that she was examined solely and apart from her husband, at his dwelling house, by virtue of the order of the Court, Lord Eldon expressed his disapprobation of the return, saying, that "though it was conformable to some late, very loose proceedings, it was by no means agreeable to the practice, and the ancient settled form, and that in future he would expect that the returns to these commissions should be made according to the ancient and proper form;" and his Lordship referred to two precedents which had been produced by the register.

When the wife resides in a foreign country, the regular proceeding is to issue a commission to take her consent;<sup>e</sup> and Lord Thurlow refused the petition of the wife to pay her legacy of 167*l.* to her husband's agent without a commission, though it was represented to his Lordship that it would be very expensive, as she lived at Tortola, and the sum was so small.<sup>f</sup> However, it seems, that if the consent of the wife be taken before any competent authority belonging to the foreign state in which she resides, and that her examination be properly attested, a commission will not be required. As in *Minet v. Hyde*,<sup>g</sup> where the wife living at Breda, an application was made that a legacy of 881*l.* 6*s.* 8*d.*, which had been bequeathed to her, should be paid to her husband; and it was ordered, that she should appear before some of the plaintiffs, and a magistrate of Breda, to be privately examined in the French or German language, as to her consent, and the examination to be attested by notaries public, and translated on oath. And, indeed, it seems, that if a commission has been issued under the authority of the government of the foreign country in which the married woman resides, for the purpose of taking

Where wife resides in a foreign country, a commission issues to take her consent.

Commission dispensed with, when consent taken before a competent tribunal of the country where wife resides.

Where commission issued by the foreign government

<sup>d</sup> Tasburgh's case, 1 Ves. & Beames, 507.

<sup>e</sup> See *Parsons v. Dunne*, 2 Ves. sen. 60.

<sup>f</sup> *Bourdillon v. Adair*, 3 Br. C. C. 237.

<sup>g</sup> 2 Br. C. C. 663.

under which wife resides, this Court dispenses with a commission from this country. Money paid on the letter of a married woman residing in the East Indies.

On application by husband and wife for wife's money on her previous consent, an affidavit must be made by a competent person that it has not been settled.

Money will be paid to the husband on the wife's consent, though there be a

her consent, that the Court of Chancery will so far give credit to it as to dispense with the issuing of a commission of its own for the same purpose; for, in *Campbell v. French*,<sup>b</sup> where a commission had been issued from the government of Virginia, and the wife gave her consent under it to a power of attorney, executed by her husband, to receive a legacy that had been left to her in England, Lord Loughborough said, he thought that the expense of a commission might be saved, as the proceeding was very regular. And Mr. Dickens mentions an instance in which, under the particular circumstances of the case, (he does not state them,) money was ordered to be paid, under a letter of the wife, who was in the East Indies, although, upon inquiry and search, not found to have been ever ordered before.<sup>i</sup>

If the wife, upon her examination, should consent to give the trust fund to her husband, the next step to be taken is, that husband and wife should apply to the Court by petition, that the money be paid to the husband, and then it becomes necessary to inquire and ascertain whether the money has been settled or not, with which view it must be referred to the Master,<sup>j</sup> and the Court will require an affidavit from some person competent to make it, that the money has not been settled, before it will suffer it to be removed: and this practice seems to have originated with Lord Thurlow; for, in *Minet v. Hyde*,<sup>k</sup> where a consent by the wife had been taken abroad by commission, and a petition was presented by her and her husband, that the money should be paid to him, his Lordship said, that for the future he should expect an affidavit, upon such applications, that there was no settlement on the marriage. But even if there should have been a settlement, yet, if the wife's money has not been the object of it, such settlement would be no obstacle to the husband's receiving that money; for Lord Thurlow, in the same case,<sup>l</sup> having been informed

<sup>b</sup> 3 Ves. 321.

<sup>i</sup> *Palmer v. Palmer*, 1 Dick. 293.

<sup>j</sup> *Hardwick v. Mynd*, 1 Anst. 274. *Binford v. Bawden*, 2 Ves. jun. 38.

<sup>k</sup> 2 Br. C. C. 663. *Hough v. Riley*, 2 Cox's C. C. 157.

<sup>l</sup> *Minet v. Hyde*, 2 Br. C. C. 663.

that there was a settlement before marriage affecting the husband's fortune only, and not the money which had come to the wife, and that there was an affidavit to that effect, the payment was ordered. Indeed it appears in a subsequent case<sup>m</sup> that his Lordship gave part of the wife's fortune to the husband on her consent, although there was a settlement; for the report states that the petition was opposed strongly by the trustees on the marriage settlement, which proves that there had been a settlement; however, the reason for giving the money might have been, that it was not the object of the settlement.<sup>(1)</sup>

settlement, if the money be not the object of it.

So if a sum of money has been directed by will, or by any other instrument, to be laid out in the purchase of land for a married woman, and that she shall have such an estate in the land as would give her and her husband an absolute dominion over it, there too that money will be given to the husband by the Court, on the wife's consent, without requiring any purchase to be made;<sup>n</sup> as in *Binford v. Bawden*,<sup>o</sup> where money had been bequeathed to be laid out in land for a *feme covert* in tail, with reversion to her in fee; and it having been prayed that she should be examined by commission, apart from her husband, as to her inclination with regard to the disposition of the money, Lord Commissioner Eyre declared her entitled to the money, and that a commission should be awarded to examine her separate and apart from her husband, whether she would have the money laid out in land or in money; and on the return of the commission, it having been certified that she did not choose it to be laid out in land, but to be paid to her hus-

Where money has been bequeathed to a *feme covert*, to be laid out in land, to be settled in such a way as would give husband and wife complete power over it, it will be given to husband on wife's consent.

(1) It appears from Mr. Eden's note to this case, that the report is erroneous in representing that there was a settlement. Mr. Eden states, that it had been previously referred to the Master, to inquire, whether there had been any settlement made on the marriage of the petitioner, Jane; and, by the Report, it appears that no settlement had been made.

<sup>m</sup> *Dimmock v. Atkinson*, 3 Br. C. C. 195.

<sup>n</sup> *Pearson v. Brereton*, 3 Atk. 71.

<sup>o</sup> 1 Ves. jun. 512. See, also, *Cunningham v. Moody*, 1 Ves. sen. 174.

There must be a positive affidavit that there is no settlement.

band, an affidavit was required from the husband and wife, that there was no settlement.<sup>p</sup> And it will not be sufficient in any case, that the Master should, on a reference to him to inquire whether the money which is applied for has been made the subject of a settlement, merely certify that no settlement having been produced to him, it did not appear to him that the same had been settled; for where the Master certified on such a reference in this way, it was objected to, as being insufficient, and that the course of the Court was to require a positive affidavit from the party herself, that the money had not been settled in any way, his Lordship agreed that was the proper course, and referred it back to the Master to receive such affidavit.<sup>q</sup> However, there are some circumstances under which this equity will not be enforced; but the Court will permit the husband to take the wife's portion, without requiring any examination or consent on her part; while, on the other hand, there are cases in which she will not be permitted to waive her equity, though she should desire it. The first class of cases is that where the sum for which the application is made, is too small to be the subject of settlement. In the time of Lord Thurlow, the wife's consent was not required where the sum was under 100/.,<sup>r</sup> which would be given to the husband, upon his application, without any examination; but this exception to the rule has been since extended to 200/.;<sup>s</sup> and if the sum be under this amount, the Court will order it to be paid on the petition of husband and wife, though the trustees should state their belief that the wife is unwilling to have the whole paid to the husband, and that she had not concurred in the petition, there being no proof that she did disagree.<sup>t</sup>

Wife's consent not required for any sum under 200/.

The cases in which the Court will not permit the wife to waive her equity are, where the sum which she wishes to cede

p 2 Ves. jun. 38. s 5 Ves. 742. 8 Ves. 201—512  
q Hough v. Riley, 2 Cox's Rep. —524.  
157. t Elworthy v. Wickstead, 1 Jac.  
r Bourdillon v. Adair, 3 Br. C. & Walk. 60.  
C. 237.

to her husband is unascertained at the time of the application to the Court. In *Edmonds v. Townsend*,<sup>u</sup> a married woman attended in court to give her consent to the portion of the residuum of an intestate's estate being paid into the hands of her husband; but as the exact amount was not ascertained by the Master's report, the Court said they could not take her consent till the quantum was fixed. It was then proposed, that her consent might be taken for the whole which her share would amount to, without any deductions; but the Court refused, saying, "That would be, in effect, taking her consent now, to a sum to be ascertained at a future time, and thereby depriving her of the power of changing her mind in the interim." And in *Sperling v. Rochfort*,<sup>v</sup> Lord Eldon acted upon the authority of the above case, saying, "That the habit of the Court proves, that while the fund is not in a state ascertained, and, therefore, capable of being acted upon immediately upon the consent given, the consent ought not to be taken *de bene esse*, but the Court ought to leave her in the free exercise of her will, without assisting her husband to determine it until the fund is ascertained, so that it can be acted upon by delivery out of Court, or in any other way." In this case, the fund was settled, and, therefore, it was not exactly the same question that arose in *Edmonds v. Townsend*;<sup>w</sup> but in *Woollands v. Croucher*,<sup>x</sup> where the fund was not settled, the Master of the Rolls refused to take the wife's consent as to that part of the property which was unascertained, stating, that the Court never did so; and in *Jernegan v. Baxter*,<sup>y</sup> the Vice-Chancellor refused to receive the consent of a married woman to waive her equity, where her share was unascertained, saying, "Although she may not think 500*l.* the proper subject of a settlement, she may think differently of 600*l.*" In like manner, where two married women, who were pecuniary legatees, and also residuary legatees, were examined, in pursuance of a decretal order

Wife's consent not taken for an unascertained sum.

<sup>u</sup> 1 Anst. 93.

<sup>v</sup> 8 Ves. 179.

<sup>w</sup> 1 Anst. 93.

<sup>x</sup> 12 Ves. 174.

<sup>y</sup> 6 Mad. 32.

of the Court, as to whom they would have their pecuniary legacies, and also their shares in the residue of the testator's estate, transferred and paid, and a motion afterwards made, that the sums specified in their examination, and also their shares in the residue, should be paid to the persons to whom they were desired to be paid; upon the examinations, the Lord Chief Baron refused the motion. His Lordship observed, that the decretal order had been improperly drawn up, because the Court could not take the examination of a married woman as to the disposal of a fund which was not ascertained; and counsel suggesting that the objection did not apply to the sums reported due on account of the pecuniary legacies, his Lordship said, that if the amount of the residue had been made known to the married women before their examinations, they might possibly have made a different disposal of the pecuniary legacies; and he desired the petition to stand over, and the residuum to be ascertained, and the married women to be examined again.<sup>z</sup>

But where the fund is reversionary, whether it be vested or contingent, it is now decided, that the consent of the wife cannot be taken to give it up to her husband. This was the principal question in *Woollands v. Croucher*,<sup>a</sup> and an instance was mentioned, where Lord Alvanley had taken such consent; but Sir William Grant said, "My doubt is, that this is not the common case for taking the examination. The ordinary occasion for that is, where the husband applies to have paid to him money that belongs presently and immediately to his wife. Her equity is, not to prevent his receipt of it, (for it belongs to him,) but to have a settlement; and the Court requires her consent to the payment to him without a settlement; but in this instance the object is, not to bar her equity to have a settlement, but to bar her right to survivorship; for, upon his death, it belongs to her entirely. She is giving up, not her equity only, but her entire right by survivorship. That is not the case in which the Court takes her consent. If the husband has a right

<sup>z</sup> 10 Price, 152. *Godber v. Laurie*.

<sup>a</sup> 12 Ves. 174.

to convey, let him exercise his right ; but why this Court should join and aid him for this purpose, I do not know." However, in a few days afterwards, his Honour took the consent *de bene esse*, following, as he said, the case to which he had been referred, where it had been done by Lord Alvanley : and in *Pickard v. Roberts*,<sup>b</sup> the Vice-Chancellor held that a married woman could not, by her consent in court, pass a remainder or reversion in personal property to her husband. However, in the case of *Butler v. Duncombe*,<sup>c</sup> which was not referred to on the above occasions, the Court seems to have had no difficulty in taking the wife's consent as to a part of a reversionary fund. The question was, whether 4000*l.*, the portion to which the plaintiff's wife was entitled under the marriage settlement of her father, was payable during her mother's lifetime or not ? and it was held that it was not payable during her life ; but the plaintiff, being a considerable tradesman, the Court thought it not reasonable that the whole money, when payable, should be laid out for the benefit of the wife and children, but decreed, the wife being present in court and consenting, that Mr. Butler, the plaintiff, might sell or dispose of a moiety of it, as he thought fit : and even Sir William Grant, notwithstanding his opinion expressed in *Woolland v. Croucher*,<sup>d</sup> afterwards permitted a married woman to part with her reversionary interest to her husband on her consent.<sup>e</sup>

Wife's consent to part with her reversionary interest taken *de bene esse*.

But if the fund have been settled and vested in trustees for the benefit of the wife, the Court will not authorize her departure with it to any person, though she should consent to it on her examination, in the nature of a fine at law.<sup>f</sup> There are some cases reported, in which such a jurisdiction was exercised by the Court.<sup>g</sup> However, Sir William

Where wife's money is vested in trustees for wife, she will not be permitted to part with it on her consent.

<sup>b</sup> 3 Mad. 384.

<sup>c</sup> 2 Vern. 762. 1 P. Wms. 448.

<sup>d</sup> 12 Ves. 174.

<sup>e</sup> Howard v. Damiani, 2 Jac. & Walk. 458.

<sup>f</sup> Frazer v. Baillie, 1 Br. C. C. 518. Richard v. Chambers, and Seaman v. Duill, 10 Ves. 580.

<sup>g</sup> Brudnell v. Price, Finch's Ch. Rep. 365. Paget v. Paget, 2 Chan. Cas. 101. Macormick v. Buller, 1 Cox's Rep. 357. Guise v. Small, 1 Anst. 277. See also Thayer v. Gould, cited in Grigby v. Cox, 1 Ves. sen. 519.

Grant has reviewed them all, and has shown clearly that on principle a court of equity has not the authority which in these cases has been assumed.<sup>h</sup> His Honour's reasoning is this, "That the wife, while *sui juris*, means to make a provision for herself in the event of her surviving her husband. Such are the terms on which alone she wishes to contract, while in a condition to exercise her free and unbiassed judgment. She wishes to put that out of her reach, and secure it from the effect of the influence and solicitation to which she may be afterwards exposed ; and the absence of power, the legal incapacity to act, is her best security." His Honour then asks, "Why should a court of equity, professing to act over the interests of married women, say, that a woman about to marry shall not be allowed to secure to herself this kind of protection ? She has it, if the Court will not interfere ; she is deprived of it, if the Court, upon her consent, while covert, annuls the contract made for her benefit while *sui juris* ; that the case was not like those in which the husband has a right to the trust property of his wife, subject only to an obligation to make some provision for her, before he reduces it into possession. When the wife, upon examination, consents to relinquish that equity, it is by virtue of a disposing power in her, or by the intervention of the Court, that the property passes to the husband ; his marital right is allowed to operate unobstructed by the equity, which the wife does not oppose to it. The equity being out of the way, the right stands unqualified, and upon that the Court decrees. But here there is no pretence of right upon the part of the husband. As to the contingent interest, there is no power of disposition in the wife ; on the contrary, the non-existence of such power is the ground for calling upon the Court. Then, without a right in the husband to call for a transfer, or a power in the wife to make it, what is the ground of the decree ? Ordinarily, a decree or judgment of a Court does not pass the property, but merely declares the right existing by antecedent title and disposition." His

<sup>h</sup> Richards v. Chambers, and Seaman v. Duill, 10 Ves. 560.



Honour then goes on to answer the argument used to defend this jurisdiction, namely, its analogy to a fine at law, by showing that no such analogy exists; that it was upon certain technical principles, and under the cover of certain forms, that a married woman is permitted by the Court of Common Pleas to part with her estate, without a direct violation of the rule of law, denying her any disposing power; but that the proceeding of the Court of Chancery is not referable to any of those forms in annulling a settlement made before marriage. The Court exercises an arbitrary authority, giving to the acts of a married woman an effect that does not legally belong to them. Such is the reasoning, and the decision of Sir William Grant, which seems to put it beyond doubt, that where a sum of money is vested in trustees, to secure a provision for a woman about to be married, in the event of her surviving her husband, there is no jurisdiction in a court of equity to enable the trustees to transfer that money to the husband by the consent of his wife, given on her examination. And, on the same grounds, a married woman will not be permitted, by her consent in court, to diminish the security of a fund out of which she is entitled to an annuity, in the event of her surviving her husband. In *Breton v. Lord Clifden*,<sup>i</sup> William Breton was entitled to a life interest in a sum of 10,500*l.* four per cent. stock, and after his death his wife was entitled to an annuity of 200*l. per annum* out of it for her life; and, subject to this annuity, the fund was divisible amongst the children of the marriage, as the husband should appoint. Husband and wife petitioned the Court that a sum of 2500*l.*, appointed to their eldest son, might be sold, and the produce paid to the appointee; but the Vice-Chancellor refused to make the order, as no precedent of such a one was to be found.

Married woman not allowed by her consent in Court, to diminish the security of a fund out of which she is entitled to an annuity.

So, if a sum of money be vested in trustees for the sole and separate use of the wife for life, with a clause against anticipation, with remainder to the survivor of her

Money settled to sole and separate use,

<sup>i</sup> 1 Sim. & Stu. 363.

with clause  
against an-  
ticipation,  
will not be  
paid to  
husband  
on wife's  
consent.

and her husband, the Court refused to take the consent of the wife, on her examination, to give up her interest in this fund to her husband, the bill by husband and wife praying that the money should become the property of the husband, freed from the trust of the settlement. The Lord Chief Baron said, "The Court cannot interfere. It was the express intention of the parties that the fund should be secured for the wife's benefit for her life; to make this decree would be anticipating it."<sup>j</sup> And his Lordship said, that he was not sure he should have followed the example of the Master of the Rolls in *Gullan v. Trimbe*,<sup>k</sup> which had been cited before to his Lordship. In this last case, a testator had bequeathed a sum of 1000*l.* to each of his two daughters, to be laid out by his trustees in the purchase of an annuity, for their lives respectively, and their respective receipts alone to be discharges, independent of their husbands, and to be for their own separate use and disposal. On the petition of one of the daughters, and her husband, that her share of this money should be paid to her husband, it was ordered, her consent being taken.

<sup>j</sup> 2 Jac. & Walk. 456.

<sup>k</sup> Ibid. in a note.

## CHAP. IX.

OF THE EQUITY OF A MARRIED WOMAN TO AN ALLOWANCE  
OUT OF HER EQUITABLE INTERESTS, WHEN SHE HAS BEEN  
DESERTED OR ILL-TREATED BY HER HUSBAND.

THE wife's equity, as it is administered to her against her husband, or his particular assignees, secures a provision for her, to commence from his death. When the same equity is administered against the husband's general assignees, the provision supplied to the wife is a present one, because the general assignment of his property renders him incapable of supporting her; and this equity is in all cases served out of the wife's property, which is in the power of the Court. On the very same principle, if a woman have been abandoned by her husband, or, in other respects, so ill treated by him that she cannot cohabit with him, it is now the settled practice of our courts of equity, to secure a present provision for her separate support out of any equitable property in which she may happen to have an interest. But then these courts have no jurisdiction to decree such a provision to a wife, merely because her husband has deserted her, or because she finds it necessary for her safety to remove herself from his power, unless she has also property over which they have control. Such a jurisdiction belongs to the spiritual court only; and even its authority arises but incidentally from the power it has of decreeing separation *à mensâ et thoro*, when the wife libels her husband on account of desertion or cruelty, and seeks the consequent relief. And, whether the sentence of that court be for a restitution of conjugal rights, grounded on the charge and proof of desertion, or be for a separation

Equity to an allowance when ill treated by husband, served out of wife's property.

Jurisdiction to decree provision to deserted wife, belongs exclusively to the spiritual court.

During Cromwell's usurpation, Chancery had jurisdiction to decree alimony.

Distinction between provision granted by Chancery and spiritual court, when wife ill treated by husband.

on the ground of cruelty, alimony, proportioned to the fortune of the husband, will necessarily be decreed to her. Indeed, at one time the Court of Chancery had this jurisdiction exclusively; for, during the usurpation of Oliver Cromwell, there was a suspension of all ecclesiastical authorities, and they were conferred on the commissioners of the great seal, who, however, were to be guided by the ecclesiastical laws in their decisions on matters which had theretofore been of spiritual cognizance. And, accordingly, we find two occasions, during the commonwealth, on which the great seal exercised this power, viz. *Russel v. Bodvil*,<sup>a</sup> and *Whorewood v. Whorewood*.<sup>b</sup> However, the exercise of this branch of the jurisdiction of the ecclesiastical court does not depend upon the fortune to which the wife, or the husband; in her right, may be in any way entitled; for alimony will be granted to her, quite independently of any such consideration. And it is this circumstance which forms the strong and marked distinction between alimony adjudged by the Spiritual Court to a wife, in consideration of the desertion or cruelty of her husband, and the separate maintenance which a court of equity decrees to her on the same account. In the former instance, the allowance is always enforced against the husband personally, while, in the latter, the decree binds only the fortune of the wife, which is within the power of the Court; and, if she have no fund so circumstanced, she can have no provision from the Court on the ground of the cruelty or desertion of her husband. And the principle on which such a provision is given out of property of this description against the husband, when he deserts his wife, as well as against his general assignees, in case of his bankruptcy or insolvency, is, that the law, when it gave the wife's property to the husband, imposed on him the obligation of maintaining her; and, if he failed in that obligation, either by the desertion of his wife, or by his inability to assist in her support, this Court would fasten that obligation upon the property itself.

<sup>a</sup> 1 Chan. Rep. 186.

<sup>b</sup> 1 Chan. Cas. 250. Finch's C. C. 152. 1 Chan. Rep. 223.

It is no easy matter to ascertain at what time courts of equity first lent their aid to secure to married women a subsistence out of their own fortunes, when they had been deserted or abused by their husbands ; for it cannot be collected from the early cases in which separate allowances were decreed, whether the decrees were made against the husbands with respect to their wives' fortunes in the power of the Court on the ground of cruelty or desertion, or against themselves personally, in the enforcement of an agreement between husband and wife for a separate maintenance. In *Lasbrook v. Tyler*,<sup>c</sup> all that is stated is, that " the plaintiff, on the behalf of the other plaintiff, Margaret, his sister, sought to be relieved against the defendant, Tyler, her husband, for an allowance to be given to her for maintenance, for all the time she departed from him, which was a year and a half, which this Court decreed, and also the benefit of a bond given before marriage." This is the entire of the report, from which all that can be inferred with certainty is, that, at that period, the Court of Chancery would decree, at the suit of the wife, the arrears of a separate maintenance against a husband ; but we are left to guess under what circumstances the separate allowance was created. For, although the wife sought for an allowance " for all the time she departed from him ;" yet it remains in doubt, whether that was a departure in pursuance of an agreement for separation and separate maintenance, or a departure occasioned by the harsh treatment of the husband. The next case is *Ashton v. Ashton*,<sup>d</sup> which is as short and as unsatisfactory as that which preceded it. It is thus reported : " The plaintiff's suit is to be relieved against the defendant, her husband, for alimony, which, upon several long hearings, and all consideration imaginable taken in this cause, being a case of great consequence, and between persons of quality, the defendant refusing to comply with the Court's mediation, this Court decreed the defendant to pay to the plaintiff 300*l.* per annum, so long

c 1 Chan. Rep. 44.

d Ibid. 164.

Provision  
decreed to  
a wife, ill-  
treated by  
her hus-  
band, out  
of her  
money  
vested in  
trustees,  
and which  
by articles  
was to  
have been  
laid out in  
land.

as they lived apart." Now, as this case was decided during the commonwealth, while the ecclesiastical authorities were suspended, it is rendered doubtful whether it was merely a case of alimony, which before and since the usurpation legitimately belonged to the spiritual jurisdiction, or whether it was a case of equitable cognizance, arising from the husband's misconduct and the wife's equitable portion, or from an agreement between them that they should live apart. So that these cases throw but little light upon the subject of this inquiry. The first case in which the Court of Chancery distinctly decided that a wife who had been ill treated by her husband should be relieved by an allowance out of her own equitable fortune, was that of *Oxenden v. Oxenden*.<sup>o</sup> There the bill was filed by Lady Oxenden, by her next friend, against Sir James, her husband, praying to have their marriage agreement performed, certain leases filled up and renewed, and *in regard of ill usage*, to have an allowance for maintenance. It appeared, that upon the marriage of the defendant with the plaintiff, who was the sister of Lord Rockingham, 6000*l.*, part of her portion, was paid to Sir James, and a settlement made upon her of 1000*l.* *per annum* for a jointure; the other 6000*l.* was by the *articles* to be invested in lands and settled on Sir James for life, then to the plaintiff for increase of her jointure, remainder as a provision for younger children, remainder to Sir James, his heirs and assigns, and, until a purchase made, to be placed at interest with the consent of the plaintiff and defendant and her trustees. The marriage was had; and there being no issue, and the money lying dead, and some leasehold estates, which, by the marriage articles, were to be kept up, not being renewed, as they ought to have been, and Sir James, by his cruel usage, having forced the plaintiff, his wife, to separate from him, the bill above mentioned was filed. There was a cross bill by Sir James, to have the 6000*l.*, which, by the default or obstinacy of the trustees, lay dead, invested in a purchase,

and until a purchase found to be placed at interest on security, or in some of the public funds.

The ill-treatment of the lady being fully proved, the Court decreed that the 6000*l.* should be placed out at interest, and the plaintiff to receive it for her separate maintenance, until there should be a cohabitation; and it was said by the Lord Keeper, that as a court of equity will oblige a husband who comes into equity for his wife's portion, to make a settlement upon the wife by way of jointure, or to secure a maintenance to her, in case she outlives the husband; the Court ought much rather to do it, where the wife is at present reduced to a starving condition, and especially when, as in this case, the execution of a trust is to be directed by the Court. It was argued for the defendant in this case,<sup>f</sup> that alimony was only to be sued for in the spiritual court, and to decree it here would be to decree a divorce. On the other side it was said, that the spiritual court has no original and proper jurisdiction of alimony, but only incidentally and consequentially when they hold plea of divorce, of which they have proper jurisdiction; and if it had, yet the Chancery has a concurrent jurisdiction, as with the admiralty and other cases peculiar to their jurisdiction; and to decree alimony here is not to decree a separation, for if he thinks she left him without just cause, he may sue in the spiritual court for restitution of conjugal duties, and if he prevails, the separate maintenance will cease. But the Court said, they would not declare where this Court will give separate maintenance, and where not, but that here being *trust money* over which the Court has a power, they would decree the interest of it for her separate maintenance so long as she lived apart from her husband. And this is the true principle on which a court of equity acts, when it decrees a separate maintenance to a married woman where there is no agreement, namely, the *power* which the Court possesses over her portion. And indeed, the Court gave a strong instance in this case of the

Interest of trust money, decreed to wife for separate maintenance during their separation.

<sup>f</sup> Vide Prec. Chan. 239.

Interest of wife's legacy decreed to her for life for her maintenance, she having been ill treated by her husband.

exercise of *that power* over such a portion, for although there were articles before marriage for the settlement of this sum of 6000*l.* upon Sir James for his life, yet these articles were so far controlled that the interest was given to Lady Oxenden during the separation, a decree that could not have been made, if this part of her fortune, like the other sum of 6000*l.*, had been actually *settled* on the marriage. The case of *Nicholls and Danvers v. Danvers*,<sup>g</sup> was decided on the same principle. There the defendant, Danvers, on his inter-marriage with Susan, one of the plaintiffs, and sister of Sir Edward Nicholls, received a portion of 2000*l.* with her, and made a suitable settlement upon her. After marriage, the plaintiff, Susan's mother, died intestate, by which one third of her personal estate of the value of 3000*l.* came to her, as her share of the intestate's estate. She was treated with great severity and cruelty by the defendant, and she parted from him. This bill was filed by Mrs. Danvers, by her next friend, Sir E. Nicholls, for the 3000*l.* for her own use for her maintenance. There was also a cross bill by Danvers, the object of which was that the administrator might pay this money to him. But the Lord Keeper decreed that so much of the principal as should remain after making good the 2000*l.* fortune of the plaintiff Susan, in case the same should not appear to have been fully paid to the defendant, as he alleged by his answer, should be brought before a Master, and placed out at interest, to be paid to the plaintiff Susan for life for her maintenance, then to the defendant, the husband, for life ; if any issue, the principal to the issue ; if none, to the survivor of Danvers and his wife, "*he, the defendant, being obliged to come into equity for the same.*" The costs of all the parties, except of the defendant, were to be paid out of the intestate's personal estate before division ; but as to the defendant Danvers, the Court did not think fit to allow him any costs.

There is a memorandum annexed to this case by the reporter, that the defendant had given a note to his wife,



that if he should again use her ill, she should have her share of her mother's estate to her own use, which, if it were the fact, would render it doubtful whether the decree was founded upon this agreement, or upon the cruel conduct of the husband, and the wife's right to a share of the intestate's personal fortune. However, it appears from Mr. Raithby's note to this memorandum, that there was an allegation by Mrs. Danvers, in her bill, that such a note had been given by the defendant to her, which he had forced her to return to him, and that the fact was denied by the answer, but that the decree takes no notice of such an agreement. Indeed, the language of the Chancellor, in pronouncing the decree, shows what the true ground of it was, viz. "That the husband was obliged to come into court for his wife's money;" so that the Court must have been administering an equity to the wife arising from her trust fund, and not decreeing the performance of an agreement. The decree in *Williams v. Callow*<sup>b</sup> was had on similar circumstances. There a person of the name of Williams, a glover, agreed to give his son 1500*l.* and to assign over to him his house and his trade, if Mrs. Callow would give to her daughter a portion of 600*l.*; but Mrs. Callow insisting that she would give only 500*l.*, Williams, the son, undertook that if she would give her bond for 600*l.* that he would return 100*l.* to her. The marriage afterwards took effect, and the husband proving drunken, rude, and abusive to his wife, and wasteful of his property, his father prevailed upon him to reassign his house to him for an annuity of 60*l. per annum* for his life. The husband came to an agreement also with Mrs. Callow, his mother-in-law, to take a bond for 500*l.*, payable to a trustee, the interest of which was to be paid to him during the joint lives of himself and his wife, and if he survived, the principal to be paid to him; and he gave a release of the portion to Mrs. Callow. Williams, the husband, filed a bill to set aside the release he had given to his mother-in-law, and to have a legacy of 150*l.*,

which had been given to his wife by her grandmother, and to have the portion made up 600*l.* although he had delivered up the last bond for 100*l.* This bill was dismissed, as it appeared that the wife had given a release to her mother of the grandmother's legacy before marriage, and because the treaty was for the 600*l.* portion only, and there was no mention made of the legacy, and because the release might have induced the mother to give so large a portion. The bill was dismissed also as to the 100*l.*, as the plaintiff promised before marriage to release it, and did actually give up the bond after the marriage. Mrs. Williams, the wife, filed her cross bill to have the interest of her portion for her separate maintenance, which the Chancellor decreed accordingly, declaring that this was a much stronger case than that of Sir James Oxenden,<sup>i</sup> for that there the wife was only relieved from the ill behaviour and beastliness of Sir James, but that here cruelty was mixed with it; that Sir James Oxenden was of substance to have maintained his wife and lived suitable to his estate; that here the husband has wasted all, and has no fixed habitation, but goes from ale-house to ale-house; and that both cases were alike, in that the *wife's fortune was in trustees*, the bond for the 500*l.* being taken in Mr. Callow's, the wife's brother's name. The decree was that the 500*l.* was to be brought into court, the principal to be paid to the survivor of husband and wife, and the interest to be paid in the first place to the husband, up to the time of his last separation from his wife; but as to the interest accrued due since the separation, and for the future, to be paid to the wife for her necessary support and maintenance, until the said husband shall have applied himself to some course of business, or some way of living suitable to receive his said wife, he having put his said wife in danger of her life, by firing a pistol at her, and other rude and cruel treatment, and she having been in a manner turned out of doors by the plaintiff's father.<sup>j</sup>

Interest of wife's portion decreed to her for her necessary support, she having been cruelly treated by her husband.

<sup>i</sup> 2 Vern. 493. Prec. Chan. 239.

<sup>j</sup> 2 Vern. 753. note 4.

The same doctrine was maintained by Sir Thomas Clarke, in *Sleech v. Thorington*,<sup>k</sup> where several questions arose upon the effect of a will, in which one of the bequests was a sum of money to a married woman, who was made a defendant, and had answered alone, her husband being abroad; by her answer, she alleged, that her husband had embezzled part of her fortune, and had gone abroad at the time of putting in her answer, and that she had no maintenance from him; and, therefore, she prayed that her property under the will should be paid to her separate use, without the intermeddling of her husband. Sir Thomas Clarke, recognizing the law of the Court as laid down in former cases, namely, that a wife deserted by her husband was entitled to a separate maintenance out of her own fortune in the power of the Court, said, that as no one appeared for the husband, and as the wife's answer was not replied to, there could be no proof of the fact of the husband being abroad, so as to warrant the Court in giving an immediate direction for a provision for her out of her legacy; and, therefore, that all he could do was to direct the Master to inquire whether she had been deserted by her husband, without a maintenance, and whether he had made any and what settlement or provision for her; and that, in the mean time, until such report, the money would be under the power of the Court, and should be transferred, subject to further order. So, in *Atherton v. Nowell*,<sup>l</sup> where the husband was in gaol for debt, in which his wife could not cohabit with him on account of his harsh treatment, and of the delicacy of her health, the Court, upon her petition, ordered that a part of the dividends due upon a sum of 13,085*l.* 13*s.* 3 *per cent.* bank annuities, to which she was entitled under the will of her uncle, should be paid to her for the present maintenance of herself and her infant child, and referred it to the Master to inquire into the circumstances and situation of the family of the petitioner and her husband, and in what manner, according to the

Inquiry directed by the Court, as to the abandonment of the wife by her husband, with a view to secure a maintenance to her out of a legacy left to her.

Part of dividends of wife's portion ordered for her present support, and an inquiry as to the mode of settling the entire, the husband being in gaol for debt, and treating her harshly.

<sup>k</sup> 2 Ves. sen, 560.

<sup>l</sup> 1 Cox's Rep. 229.

circumstances and situation they may be in, the growing produce of the said bank annuities, standing in the name of the Accountant General, in trust in the cause, ought to be settled; and also to inquire into the value of an estate in Jamaica, which petitioner's husband is suggested to be entitled to, and what his interest is therein. In *Morley v. St. Albans*,<sup>m</sup> the late Master of the Rolls, Sir William Grant, afforded similar protection to a married woman, whose husband had gone abroad and left her without any provision. In this case, the husband, Mr. St. Alban, being entitled to the dividends upon the sum of 520*l.* 5 *per cent.* bank annuities, for the life of his wife, and in her right granted an annuity of 100*l.*, part of them, and went abroad, no settlement having been made upon Mrs. St. Alban. The trustees of the stock refusing to pay the annuity, and Sir George Wright, a surety for the payment of it, having been obliged to pay 100*l.* of it, filed his bill against the trustees, the annuitant, and Mr. St. Alban, who was stated to be out of the jurisdiction, praying that he might be repaid the sum that he had paid, and that an appropriation might be made to answer the future payments of the annuity, during the life of Mrs. St. Alban. On the other hand, a bill was filed on behalf of Mrs. St. Alban, praying, that all the dividends might be paid to her for her separate use, alleging, that her husband had left the kingdom without making any provision for her. His Honour said, he could not give her the entire of the dividends, as the husband had assigned 100*l.* *per annum* of them for valuable consideration, but that he had no difficulty in giving her the remainder that was undisposed of, viz. 160*l.* *per annum*, during the absence of her husband, if it should be proved that her husband had left her unprovided. His Honour accordingly referred it to the Master, to inquire whether Mr. St. Alban was living abroad, and had made no provision for his wife.

Dividends of wife's fortune, decreed for her separate use, when deserted by her husband.

In the above case, Sir William Grant suggested a question, which, he said, had never yet been made the gist of a

case, and which would require great consideration ; it is this, that supposing the husband, while he was performing his duty towards his wife by maintaining her, should assign her equitable life interest for valuable consideration, whether his subsequent abandonment of her would divest the right which the assignee had vested in him, and give her a right to a maintenance out of that fund for which he had paid ? This question has since arisen in the case of *Elliott v. Cordell*,<sup>a</sup> where the husband and wife joined in a sale of her life interest in stock, he being then solvent, and maintaining his wife : he, in twenty years after the sale, became bankrupt, and the wife filed her bill against the purchaser, praying for a provision out of this life interest ; but the bill was dismissed, the Vice-Chancellor, Sir Thomas Leach, saying, that as against the general assignees of the husband, she had an equity to a provision out of a fund of this nature, which devolves on the assignees by act of law ; for when the title of the assignees vests, the incapacity of the husband to maintain his wife has already raised this equity for her ; but that the same principle did not necessarily apply to a particular assignee for a valuable consideration, who purchased this interest when the husband was maintaining his wife, and before circumstances had raised any present equity in this property for the wife. But though equity will decree a maintenance to a wife out of her own fortune, which the husband has not reduced into possession, where it has been proved that harsh conduct has been used by him towards her, yet it would seem that that Court will not go so far as to entertain a bill for the discovery of acts of ill usage, to lay a foundation for a decree of that nature ; and this may be inferred from the case of *Hinks v. Nelthorpe*,<sup>o</sup> where the bill was filed by the wife against her husband, to establish an agreement entered into before marriage, for a separate maintenance for her ; and amongst other things it prayed a discovery of several un-

Bill by wife for discovery of ill usage by her husband, as a ground for this equity, dismissed.

<sup>a</sup> 5 Mad. 149.

<sup>o</sup> 1 Vern. 204.

kindnesses and hardships which the defendant, as it was pretended, had used towards his wife, to make her recede from this agreement ; to which *discovery* the defendant demurred, and the demurrer was allowed. Now, although the object of this bill was only to establish an agreement for a separate maintenance, yet if it had been for a separate maintenance out of her own fortune, in consequence of ill treatment, and for a discovery of such ill treatment, it is obvious that the result must have been the same.

In all the instances which have been stated above of provisions secured to married women out of their equitable property, it is to be observed, that these estates were of a personal nature ; but there cannot be a doubt, though there is no case to support the position, that the rents and profits of their freehold and real estates would be subjected to the same rule ; and we may therefore fairly conclude from these authorities, that wherever a husband is entitled to property, real or personal, in right of his wife, which happens to be unsettled and vested in trustees, or in any other way, within the jurisdiction of a court of equity, if he misconduct himself towards her, either by leaving her without the means of support, or by harsh and cruel conduct, that Court will intercept his marital right to the fund, and maintain his wife out of it, until he returns to his duty, and treats her as he ought.

But then a separation between husband and wife, without cruelty or desertion on his part, will not raise an equity for the wife to claim a provision of this kind ; it is essential to the validity of her claim, that one of these two ingredients should exist in the transaction, namely, either that her husband should have deserted her without giving her adequate means of support, or that she should have been forced by his cruel conduct to leave his protection. If a separation have taken place without either of these causes, and the wife seek a separate maintenance out of her equitable estate, the application will be refused. And so it was settled by the Master of the Rolls, Sir William

Grant, in the case of *Duncan v. Duncan*,<sup>p</sup> where a bill was filed by the wife, by her next friend, against her husband, charging that a separation had taken place between them in consequence of his cruelty towards her, and praying that he might be compelled to make a settlement to her separate use of the interest of 500*l.* 4 per cent. stock, which had been bequeathed to her by her former husband, and which was vested in trustees. The defendant, by his answer, denied that the separation was on account of cruelty, and stated, that upon his marriage with the plaintiff a settlement was executed whereby 3000*l.*, part of the property to which plaintiff was entitled in her own right, was settled upon her, but that the defendant had not made any provision for her out of his own property. No evidence was given by either party as to the cause of the separation. His Honour dismissed the bill, saying, that it could not be sustained, being, in fact, a bill for a separate maintenance; that the facts were, that the husband and wife did not live together, and that the cause of the separation did not appear; that no provision had been made for the wife in addition to the settlement; and that his Honour did not find any instance, upon such a state of facts, that the Court had ever decreed separate maintenance to the wife, either out of the husband's property, or out of the property of the wife; that the cases in which the Court had interfered were where the husband had been guilty of cruelty, had turned the wife out of doors, or had quitted the kingdom without making any provision for her; but that where the case goes no further than that they merely live separate and apart, his Honour could find no authority for decreeing a separate maintenance to her, still less for making any addition to what had been already settled on her.

Separation between husband and wife, not caused by his cruelty or abandonment, does not raise this equity for her.

Even where a third person has advanced money to support a married woman, who has been deserted by her husband, the Court has ordered him to be repaid out of the

Part of principal of a legacy paid to a stranger, supporting wife deserted by her husband, and interest of the remainder decreed to herself.

principal of a legacy that had been bequeathed to her, (no settlement having been made upon her,) and that the interest of the remainder should be paid to her for her separate use. In *Guy v. Pearkes*,<sup>q</sup> the person who had supported the married woman made an affidavit that he was induced to make advances upon the faith of being repaid out of the fund in Court, and prayed that he should be accordingly reimbursed. Lord Eldon said, that he had a strong impression on his mind, that this had been done, and that, independent of precedent, his Lordship thought the Court might do it, as the husband deserting his wife leaves her credit for necessities, and would be liable to an action.

If wife's equitable portion be obtained fraudulently from the Court, this equity will attach upon it in the husband's hands.

It must be observed in all the above cases, in which the Court of Chancery decreed a separate provision to a married woman out of her own portion, that portion was not only of an equitable quality, and therefore subject to the power and to the rules of the Court, but it had never been reduced into possession by the husband, and had remained as a trust fund, liable to all the equities of the wife. It must also be remembered, that this jurisdiction of the Court grows out of the wife's trust fund, and that when that has been once removed and transferred to the husband, her claim to a separate allowance out of it, and the Court's power over it, are at an end; but then the fund must have been taken out of the reach of the Court by fair and honest means, otherwise the wife's equities will continue to be a lien upon it, whether it have got into the possession of the husband, or of any other person for his use. If he have acquired it by a fraud, the Court will follow it into the hands of trustees, if he have transferred it for himself; and if he still have it, or else have disposed of it *bonâ fide*, he himself and his property will be made responsible to the extent of it: and this principle has been established by the cases of *Colmer v. Colmer*,<sup>r</sup> and *Watkins v. Watkins*.<sup>s</sup> In the for-



mer case, Mr. Colmer had executed articles in which he covenanted that 4000*l.*, part of his wife's portion, should be lodged in the hands of trustees, in trust, to pay the interest thereof to Mrs. Colmer for life, for her separate use, and as to 8000*l.*, the residue of her fortune, he was to have the use of it in trade during his life, and after his death it was to be vested in trustees to pay her the interest during her life, &c. &c. She was also to have, after her husband's death, the plate which she had before the marriage. After the marriage, several quarrels arising about her children by her first husband, whose portions Mr. Colmer was desirous to get into his hands, he treated her with great cruelty, denied her children and acquaintance admittance to her, gave the management of his family to a footman, encouraged the servants to insult her, and at length withdrew himself privately, and sailed for Maryland. Before his departure, he conveyed the entire of his property, together with her jewels, plate, and wearing apparel, to trustees in trust to pay his debts; and the bill was filed by her against her husband and his trustees, for a discovery and a maintenance out of the estate of her husband, and that he might be compelled to give security to settle the 4000*l.*, and the 8000*l.*, according to the articles, and that the trustees might restore the plate they had taken away. The defendants said, that the Court had no jurisdiction to decree an allowance to the plaintiff, as her portion was not within the power of the Court, having been reduced into possession by the husband, and that the defendants were trustees for him, and not for her. On the other side, the counsel said, that the defendant, Colmer, had most undesignedly given the Court jurisdiction, by the contrivance of vesting the entire of his property in trustees, for that he had blended her portion with the rest of his estate, and made them trustees for the plaintiff, for the uses under the articles, which brought the case within the principle of *Oxenden v. Oxenden*,<sup>t</sup> where

<sup>t</sup> 2 Vern. 493.

the wife's money had been vested in trustees, in trust for the husband for life, and the Court thought it reasonable that the wife should have a maintenance out of what had been once her own estate. The Lord Chancellor King said he would not inquire who was in fault in this case; that it was plain that the husband had voluntarily left her, and went away without her knowledge, and that she was shut out of her own house, so that she was turned out to the wide world; and that it plainly appeared by the deeds, that he designed to serve her so, and to prevent her from any maintenance out of his estate. His Lordship also said, that a wife is to be maintained according to the circumstances of her husband; and as the husband here has vested the property of all his estate in trustees, the plaintiff has no remedy but in this court; wherefore, it appearing to the Court, that here was a voluntary desertion of the husband, and that the deeds were fraudulent, and executed with a design to bar her of all maintenance, and the defendants have not proved any debts, therefore, it is to be referred to a Master, to see what is proper to be allowed for the past and future maintenance of the plaintiff, regard being had to the portion she had brought, and to the present circumstances of the defendant, till he shall return. Now, it is to be observed of this case, that though the prayer of the bill was for a maintenance out of the husband's estate, and that the decree was to the same effect, which is peculiar, yet that it was out of the husband's estate, vested in trustees, and which, together with the wife's fortune, had been vested in them fraudulently, with a view to deprive her of the means of support, and of the benefit of the contract which he had entered into with her with respect to her money. Lord Hardwicke followed the example of Lord Chancellor King, in *Watkins v. Watkins*.<sup>a</sup> In this case, the bill was filed against the husband to have a maintenance out of her own fortune, upon a suggestion of very

cruel usage, without any provocation on her side. The plaintiff was a widow, entitled to a large fortune, when she married the defendant. Previous to the marriage, she trusted him to draw up a bond with his own hand, to secure 1700*l.* for her, in case she should survive him. There was very strong evidence that the plaintiff had been cruelly used by the defendant. The defence made by him, by his answer, was, that his wife had behaved in an indecent manner with another man, and that upon her husband admonishing her mildly, she flew into a great passion, and left the house ; that the defendant went to her and entreated her to return, and offered to forget what had passed ; and that upon her refusal, he broke open her cabinet, and took out the bond for 1700*l.* His Lordship said, that the evidence of elopement and adultery was not quite full, but that the proof of her being cruelly and barbarously used was very strong and substantial ; that he should declare the bond to be an imposition ; and that the money ought to have been secured to her, to be paid out of her own fortune, in case she survived him ; that it should be referred to the Master to take an account of the personal *estate* of the plaintiff before her marriage, *which had come to the hands of the defendant* since the marriage, or to any other person, by his order and for his use ; and that so much of it as remains in specie, of capital and principal money, arising out of such estate and effects, should be placed out in real or personal securities, in the name of a trustee, to be approved of by a Master, in trust, to pay the interest arising therefrom in such manner as is hereinafter mentioned, during the joint lives of plaintiff and defendant ; and in case the defendant shall die in the lifetime of the plaintiff, then to secure the sum of 1700*l.*, the principal sum in the bond, to be paid to the plaintiff within six months after the defendant's death. And as it appears to the Court the husband has possessed himself of the greatest part of the wife's fortune, and is gone out of the kingdom without leaving a provision or maintenance for her, I decree that the interest

arising from the trust money shall be paid to her till he thinks proper to return and maintain her as he ought, and decree the defendant to pay costs. It is to be remarked of this case, that the decree gave the maintenance out of the wife's fortune here as in *Oxenden v. Oxenden*,<sup>y</sup> *Nichols v. Danvers*,<sup>w</sup> and *Williams v. Callow*,<sup>z</sup> though that fortune had not been vested in trustees, or in any other way within the power of the Court; but the principle on which his Lordship seems to have acted was this, that the money having been seized by the husband by fraud, when, in good faith, it should have been placed beyond his reach, in the hands of third persons, the imposition ought to be corrected by ordering the money to be lodged with a trustee, and then to be acted on as if at the time of the decree it had been in the possession of the Court. And even if no part of the wife's fortune had remained in specie and capital, it seems that the Court would have given her relief out of the husband's estate; for his Lordship said, that there appeared to him to be a sufficient ground for the Court to direct an inquiry what estate the defendant had, to make satisfaction for imposing on the plaintiff, and that he would do as Lord Chancellor King had done in *Colmer v. Colmer*,<sup>y</sup> when he framed his decree, by way of analogy, to the writ of *ne exeat regno*, and impounded the fortune of the husband for the wife's maintenance, till he should think proper to return. So that these cases of *Colmer v. Colmer*,<sup>z</sup> and *Watkins v. Watkins*,<sup>a</sup> form an exception to the general rule, that equity will enforce a provision for a married woman who has been deserted or ill treated, only out of her property that is in the power of the Court; for it appears, that if the husband have prevented it from being placed in the hands of trustees, when it ought to have been so secured, such fraud shall not prevent the right of the wife to a provision out of the husband's estate,

This equity served out of husband's estate, if wife's portion have been fraudulently removed by him, and not accessible.

<sup>y</sup> 2 Vern. 493.

<sup>w</sup> 2 Vern. 671. Eq. Ca. Ab. 68.

<sup>z</sup> 2 Vern. 752.

<sup>y</sup> Mos. 113—118.

<sup>z</sup> Ibid.

<sup>a</sup> 2 Atk. 96.

at least to the extent of her fortune, if he desert or ill treat her.

It seems, however, that a married woman, who has any other sufficient means of support, would not be entitled to this equitable relief; as the Vice Chancellor held, in *Aguilar v. Aguilar*,<sup>b</sup> that this principle does not apply where the wife had secured to her a competent separate maintenance.

This equity not enforced for wife who has competent separate maintenance.

<sup>b</sup> 5 Mad. 414.

## CHAP. X.

WHEN THE EQUITY OF A MARRIED WOMAN TO A SEPARATE MAINTENANCE ON THE GROUND OF DESERTION OR ILL USAGE BY HER HUSBAND WILL BE GRANTED, AND IF GRANTED, ON WHAT OCCASIONS IT WILL BE DISCONTINUED.

BUT though a husband is bound to maintain his wife, and though equity will exact the performance of that duty, in the manner, and under the circumstances which have been detailed in the preceding chapter, still there are limits to this favour of the Court beyond which it will not proceed. For occasions do often arise, where, although the wife have received such treatment, she cannot have this relief, or if she have already obtained it, it will be discontinued; and these are, when, by her own misconduct, she shows herself undeserving of the protection of the Court. Thus, if a wife, claiming a separate maintenance out of her own fortune, on the ground that her husband has deserted or ill used her, be proved guilty of elopement or adultery, the Court will consider such conduct as a complete bar to the relief she seeks, and will dismiss her bill. In *Watkins v. Watkins*,<sup>a</sup> Lord Hardwicke laid it down, that the Court would not allow any thing for maintenance to the wife upon full proof of elopement and adultery. But, it must be observed, that where a bill has been filed by her for a maintenance on the ground of cruelty or desertion, the husband will not be allowed to read any deposition to prove her guilty of criminal conversation, unless it has been expressly

Wife seeking a provision on account of ill treatment of her husband, will be refused, if she be proved guilty of elopement or adultery.

Wife's adultery must be put in issue by the

<sup>a</sup> 2 Atk. 96.

charged and put in issue by the answer, and made part of his defence and excuse for his ill treatment of her. And so Lord Hardwicke held in the same case. A similar rule was laid down with respect to the proof of the wife's adultery in the case of *Lady Doneraile v. Lord Doneraile*.<sup>b</sup> There the bill was filed by the wife against her husband for a separate maintenance, (it does not appear upon what ground, whether of desertion or cruelty,) and the defendant insisted by his answer, in bar of the equity claimed by the bill, that she did not behave with that duty and affection as became a virtuous woman, much less the defendant's wife, and in order to support this suggestion, he entered into proof of particular acts of adultery. These depositions were allowed to be read in the Court of Chancery of Ireland; but on an appeal to the English House of Lords, they were not admitted. This case proves also that adultery, if put in issue and proved, would be a bar to a separate maintenance to a wife, who sought that relief against her husband's unkindness.

pleadings, otherwise proof of it cannot be received by the husband as an answer to the charge of ill-treatment, and to the claim of a provision.

But though the adultery of the wife would be an insurmountable impediment to her obtaining a provision under such circumstances, yet if the husband should file a bill, while she is living in that state, for her unsettled property, which is vested in trustees, the Court will not let him have it, at the same time that, if she should apply for any share of it, it would be refused to her also on account of her misconduct. *Ball v. Montgomery*<sup>c</sup> is a remarkable instance of this neutrality of the Court between husband and wife with respect to her money. In this case, previous to the marriage of Mr. and Mrs. Ball, 5000*l.* (to the interest and dividends of which she was entitled until she should arrive at the age of twenty-one, when the principal was to be transferred absolutely to her,) was vested in trustees, in trust, that the husband should receive the interest and dividends after the death of his wife, if he should survive her, during his life, and if there should be no issue, with power to her

If husband claims his wife's equitable portion, while she is living in adultery, it will be refused: and if she claim a provision out of it on account of his ill treatment, it also will be refused.

<sup>b</sup> Cited by Lord Hardwicke in *Clarke v. Peniam*, 2 Atk. 337.

<sup>c</sup> 2 Ves. jun. 191. 4 Br. C. C. 338.

to appoint as she should think fit, and in default of appointment, to her next of kin, according to the statute of distributions. The interest and dividends during the joint lives of husband and wife were not disposed of by the settlement. When she came of age after her marriage, she appointed the whole sum to her husband, in case there should be no issue. In some years afterwards she eloped from him, and from the time of the separation had lived in adultery. The bill was filed by the husband against his wife and her trustees, praying to have the dividends during the joint lives of himself and of his wife, and to have the fund secured on account of his contingent interest, viz. in the event of there being no issue of the marriage. There was an attempt on both sides to alter the settlement by parol evidence, the husband alleging that the intent was that he should have the interest and dividends during his life; and, on the other hand, the wife and her trustees claiming them for her separate use. However, the Court would not suffer any evidence to be given of the intention of the parties as to the settlement. The wife, by her answer, swore, that she had been cruelly treated by the plaintiff, and that his personal violence had forced her to leave his house, from which time he had never offered her any maintenance; that she was quite destitute of the means of support; and that she hoped, that as she had been compelled by his cruelty to separate from him, and not in consequence of any crime of her own, the Court would not interfere to put him into the possession of her property. However, Lord Loughborough considered the interest and dividends during the joint lives of husband and wife as a sum of money belonging to her, and not specifically given to her husband, which, of course, he must come into equity for, and which must be subject to the usual equity; but that the wife had in the present instance forfeited that assistance of the Court by her delinquency, and that the husband could not have this money, it having been intended for their mutual support. His Lordship therefore ordered the future dividends to be brought into Court, first paying the plaintiff the costs he had



been put to by a suit, which his wife had instituted against him in the ecclesiastical court, saying, that the delinquency of the woman is a reason for not giving the dividends to her, and that he could not give the whole to him on account of her interest, and that the situation of the case would probably produce some agreement for her future support. His Lordship also stated, that the ground of jurisdiction, on which the Court would not permit the entire of the dividends to be taken by the husband, was, because the fund is intended for the mutual maintenance of both, if they live together, and therefore, if the whole were given to either of them, it would defeat the intent; that to give her the dividends, while she lived in adultery, would be to enable her to continue in that state. In *Carr v. Eastabrooke*,<sup>a</sup> the Lord Chancellor, Lord Loughborough, adopted the same line of conduct with respect to a sum of 350*l.* belonging to a wife, who had separated from her husband, and lived in adultery. She had been divorced *à mensâ et thoro*, for adultery, and now petitioned that this sum should be settled to her separate use. The husband at the same time petitioned, that it should be paid to him, without obliging him to make a provision for her. It appeared that she had continued to live with the person with whom she had eloped, till his death; and it was alleged, that since that time she had been supported by his mother, and that she had no other provision. His Lordship said, he could make no order upon either petition; that he could not settle this sum to the separate use of the wife, and must leave it where it was. In like manner, if a sum of money should accrue to the wife during the separation caused by her adultery, the husband not having been a purchaser of it, the application of either of them for any part of it would be rejected. And the principle on which the husband would be refused, Lord Loughborough states to be this;<sup>b</sup> that if it happens from the situation of the parties, that they cannot enjoy in common that which should maintain both, it would be very

<sup>a</sup> 4 Ves. 146.

<sup>b</sup> Legard v. Johnson, 3 Ves. 360.

hard that the party from whom it moves should lose, and the other should gain the whole benefit.

If provision be made for a wife by the Court on account of husband's cruelty, it will be discontinued on his undertaking to treat her kindly.

But if the wife have had a separate provision decreed to her on account of the cruelty or desertion of her husband, it would seem that such allowance would be discontinued by the Court, if the husband offers to cohabit with her, and undertakes to treat her kindly for the future. In the case of *Head v. Head*,<sup>f</sup> Lord Hardwicke said, that there were instances where, notwithstanding an absolute decree for a separate maintenance, yet, upon the circumstance of the husband's consenting to cohabit with his wife, and promising to use her kindly, the Court have refused to continue a separate maintenance. This observation having been made by his Lordship in a case where there was an agreement for a separate maintenance, may be said to have been confined to cases of that description; but surely if the Court would, after a decree for a separate maintenance on the ground of an agreement, discontinue that allowance upon the offer of the husband to cohabit in future with his wife, and to treat her well, it would *à fortiori* discontinue it, where the only cause of granting it, namely, desertion or ill usage, had been removed. Indeed, in general, the decree is, that the allowance shall be paid to the wife, until the husband returns to his duty, and conducts himself towards his wife as he ought, which goes a great way to prove that it would be withheld from the wife if she refused to return to him upon his offer to cohabit with her. And the Court acted on this very principle in *Bullock v. Menzies*,<sup>g</sup> where Mrs. Hall, who was declared to be entitled to a life interest in a large sum of money, in this cause, petitioned the Court that a maintenance should be allowed to her out of it, on the ground that her husband, who was a captain in the 38th regiment, was then with his regiment in the West Indies, and had been there for upwards of a year; and 200*l. per annum* was ordered to be paid to her half yearly. On the return of the husband to England, he petitioned the

<sup>f</sup> 3 Atk. 296.

<sup>g</sup> 4 Ven. 798.

Court that the 200*l.* *per annum* might be paid to him and his wife jointly, as he was willing to reside with her, which she declined to do. Mrs. Hall refused to consent to the prayer of that petition, and, therefore, the order that had been obtained by her was discharged. So, it would seem, that if a married woman, having a maintenance allowed to her on account of the absence or unkindness of her husband, should live in a state of adultery after the separation, the Court would, on proof of the fact, withdraw the provision that had been granted. There is certainly no authority to this effect; but there can scarcely be a doubt, that the Court would, on such an occasion, adopt this line of conduct. It would be only acting upon its own principle; for if a separate provision would be refused to a wife complaining of her husband's cruelty, because she herself has been guilty of adultery, why should not that favour be withdrawn from her after she has obtained it, if she commits the same offence? Would not the same conduct which would disqualify her from obtaining relief in the one case, show her to be unworthy of the continuance of it in the other case?

If provision be made for wife, because her husband resides in a foreign country, it will be discontinued on his return and offer to cohabit with her.

But although a married woman be entitled to a separate allowance out of her own fortune, where her husband will not cohabit with her, yet, if the duties of his profession should necessarily lead him to distant countries, to which she is unwilling to accompany him, he being ready to receive her, and to live with her, and no charge of cruelty or unkindness being made out against him, the Court will refuse to order any provision for her, however correctly she may have conducted herself in other respects. And the same case of *Bullock v. Menzies*,<sup>h</sup> establishes this proposition; for, in that case, after the allowance to Mrs. Hall had been discontinued, on the ground that her husband was willing to live with her, she again petitioned the Court for an order that the same annuity should be paid to her; stating, that since it had been discontinued, she had lived at the expense

If the wife refuse to accompany her husband to foreign countries, she will not be allowed a provision on account of his absence.

<sup>h</sup> 4 Ves. 798.

of her friends ; that her husband had no property to support her, except his pay ; that he had since exchanged into another regiment, and was then on his passage to the East Indies, and that he had not made any arrangement or provision for her maintenance. But the petition was dismissed, his Lordship saying, " Here is an officer going from place to place in the course of his duty, and he is willing to receive her. I cannot, because a woman does not choose to live with her husband, decree a separation between husband and wife, and give her a separate alimony. It is his property in her right. Her marriage with him might have been prudent or not ; but she is his wife, and he is willing to support her and himself out of this fund."

## CHAP. XI.

OF THE EQUITY OF MARRIED WOMEN TO A SETTLEMENT OF THEIR OWN PROPERTY, WHERE, HAVING BEEN WARDS OF THE COURT OF CHANCERY, THEY HAVE BEEN CLANDESTINELY MARRIED.

THE provision which the Court of Chancery insists on for its female wards, who have been clandestinely married, forms an essential part of an essay, one of the objects of which is to point out the various equities which attach upon the property of married women, and to illustrate the care and interest which that jurisdiction takes in their concerns. The superintendence of infants of either sex, and of their fortunes, belongs to this Court, as a branch of its authority ;<sup>a</sup> and, if they have been made wards of the Court, both their persons and their property will be protected so long as their infancy continues ; and in the execution of this important trust, it seems to be, in most instances, the settled practice, whenever a female ward has been married without the consent of the Court, to commit the husband for a contempt, and to persevere in the imprisonment until he makes a sufficient settlement upon her. But the settlement which is deemed sufficient for the protection of a wife in ordinary cases, will not clear this contempt ; for the Court, resenting the insult put upon its authority by the surreptitious marriage of a female infant, whose property and person her minority had placed under its guardianship, will impose, as a punishment on the offending husband, terms much more unfavourable to him than would be required of him to satisfy the claim of an adult wife for her equity. And the severity of these terms will be governed by

Marriage with female ward of Chancery, a contempt for which husband will be committed until he make settlement.

Punishment for marriage

<sup>a</sup> 2 Fonb. 223.

of female ward, will be proportioned to the circumstances.

The Court has no means of enforcing a settlement in such a case, except by punishment of husband.

Marriage of female infant, not a ward, is not a contempt.

been incurred, as by the conduct of the husband in the transaction, or by the greater or lesser inequality between him and his wife, in age, or rank, or fortune ; but under the most favorable circumstances, the Court will inflict punishment. The jurisdiction in matters of this nature is exercised by way of punishment.<sup>b</sup> Indeed the Court would be without the means of enforcing a settlement, if it could not treat such a marriage as a contempt ; for, where a man marries an adult, or even an infant, if with consent, whose property is within the reach of the Court, there is no jurisdiction to force him to make a settlement upon her ; and the only measure which the Court can resort to for this purpose, is to withhold its aid to the husband to reduce that property into his possession, unless he complies with the usual terms, by making a provision for his wife ; and notwithstanding his obstinate refusal to make any such settlement, still he is entitled to, and is not prevented from receiving the interest of her money, and the rents and profits of her estate, during their joint lives ; and this is the only measure which the Court can adopt when the minor, married without consent, is not a ward of the Court. For it is not a contempt of the Court, to marry an infant without consent, unless she has been placed under its protection :<sup>c</sup> so that the jurisdiction of the Court in cases of clandestine marriages, to withhold from the husband the principal and interest of the wife's fortune, and the rents and profits of her real estate, until its terms are complied with, arise from the power it has of inflicting punishment for the contempt. The Court cannot itself make the settlement of the wife's fortune without the husband's consent ; but if he do not consent, it can continue his imprisonment until the usual terms are complied with. The settlement which satisfies the Court in cases of this kind, generally deprives the husband of all the rights which the law would give him over the property of his wife, and transfers them to her during

<sup>b</sup> Smith v. Smith, 3 Atk. 304.

<sup>c</sup> Goodall v. Harris, 2 P. Wms. 560.

her life, and afterwards to her children; and even if she were willing to waive this equity, and consent to his receiving her income during his life, the Court will not permit it.<sup>d</sup>

Although it is not a contempt of Court to marry an infant without consent, unless she has been placed under its protection,<sup>e</sup> yet, the mere filing of a bill relative to the infant or her estate, constitutes her a ward of the Court,<sup>f</sup> and whether the father be living or dead, and though there be a testamentary guardian, such suit once instituted gives the Court jurisdiction to protect her against even her father, or against such guardian; and the want of notice of the fact, that the lady married without consent was a ward of the Court, has been said to be no excuse to the person marrying her: he will be considered equally guilty of a contempt, as if he had actual knowledge of it.<sup>g</sup> However, though the husband be liable to censure, whether he has notice or not, yet it seems that a distinction will be made between those who have contrived the clandestine marriage, knowing that the infant is a ward of the Court, and those who have only assisted at the ceremony, not having such notice. For Lord Hardwicke said, in the case of *More v. More*,<sup>h</sup> that all persons concerned in the original contrivance of the marriage, and being apprized of the circumstance of the infant's being a ward of the Court, will make themselves liable to its censure; but that persons not so concerned, although assisting at the marriage, will not be visited with punishment; and, accordingly, in the above case, the clergyman who performed the ceremony was declared by his Lordship not to be guilty of the contempt, he not appearing to be implicated in the design of doing the wrongful act, although he had married them in a way contrary to some of the ecclesiastical canons.

Filing bill relating to female infant, makes her a ward.

Distinction will be made between the contrivers of the marriage, knowing of the infant being a ward, and those assisting at the ceremony without such knowledge.

<sup>d</sup> *Stackpole v. Beaumont*, 3 Ves. 89.

<sup>e</sup> *Goodall v. Harris*, 2 P. Wms. 560.

<sup>f</sup> *Butler v. Freeman*, Amb. 303.

<sup>g</sup> *Long v. Elways*, Moulty, 249.  
Herbert's case, 3 P. Wms. 116.  
*Nicholson v. Squire*, 16 Ves. 259.  
<sup>h</sup> 2 Atk. 158.

Before contempt can be cleared, it is referred to the Master to see that a proper settlement be made.

It is not the intention to consider the corporal punishment to be inflicted on offenders of this description ; the object of the present inquiry is only the nature of the provision which the right to inflict that punishment enables the Court of Chancery to secure for its female wards. And, in cases of this kind, it will appear to be the common course of the Court, to refer it to the Master, to see that a proper settlement shall be made, before the contempt can be cleared,<sup>i</sup> and that the nature of the settlement will depend upon the circumstances of the case in which the reference is made. *Green v. Pritzler*<sup>j</sup> is the first case where any mention is made of a settlement having been secured for the minor. It was there referred to the Master to receive proposals from the husband ; but it does not appear that any extraordinary severity was exercised towards the husband in the terms of the settlement. However, in *Stevens v. Savage*,<sup>k</sup> much more strictness was observed towards him in that respect ; for the husband was committed for having married a ward of the Court, although it appeared that he had paid his addresses to her during the lifetime of her father, and had been encouraged by the whole family, and although the mother said by her counsel, that had her consent been asked, she would have given it ; nor was he discharged until a settlement was made upon the wife of half her own fortune to her sole and separate use, and after her death, upon her children, and of the other half on the husband for life, then to the wife for life, and then to the children, according to the appointment of the survivor. It does not appear that any particular severity was practised towards the delinquent husbands in either of these cases. In the latter of them, however, Lord Thurlow went further than the Court showed any disposition to go in the former,<sup>l</sup> for he insisted on the half of the wife's fortune for the children of the marriage, on the death of the wife ; and though ultimately that half was settled to the se-

i 1 Ves. jun. 154.  
j Amb. 602.

k 1 Ves. jun. 154.  
l *Green v. Pritzler*, Amb. 602.



parate use of the wife, yet that arose from the arrangement of the parties themselves, and not from any intimation of the Court. However, in most of the subsequent cases of clandestine marriages, it will be found that considerable power was given to the wives, by settlement to their separate use of part, and sometimes of the entire of their fortune, as a punishment for the husband's contempt. In *Stackpoole v. Beaumont*,<sup>m</sup> a separate provision was ordered for the wife; and although she was willing to consent to her husband's receiving her income, yet Lord Thurlow would not allow it. Mrs. Stackpoole's fortune was a rent-charge of 3000*l.* *per annum*, and the counsel objected that this was not a case for a settlement; that the husband was entitled to the income of his wife's fortune; and that if she consented, he should have the entire. To which his Lordship replied, "He cannot get it without the aid of equity, and I must take care that she shall have a separate provision, upon a marriage that is a contempt of the Court. I have been always very anxious, upon a runaway marriage, to secure a separate provision for the wife. He must not, therefore, now say, that upon her coming into Court and consenting, he shall take the whole. If he refuses, I will send him back to the Fleet, and then talk to him upon it." So that it seems that both husband and wife, who have been married clandestinely, are excluded from the common equity of the Court relative to her fortune, for he will not be suffered to take the income of it,<sup>n</sup> to which in ordinary cases he is held to be entitled,<sup>o</sup> though he should refuse to make a settlement upon her, and she will not be allowed to waive her equity to a provision in his favour.<sup>p</sup> In *Beresford's* case,<sup>q</sup> the entire of the wife's fortune was settled upon her for her separate use for her life, with a power to dispose of the interest as she should think proper, with various other limitations. But Lord Alvanley was not satisfied with ma-

Although wife willing that her husband should receive her income, the Court would not allow it.

Separate provision secured to the wife, upon a clandestine marriage, though she consented to the husband taking the entire.

<sup>m</sup> 3 Ves. 89.

<sup>n</sup> Like *v. Beresford*, 3 Ves. 511.

*Macaulay v. Philips*, 4 Ves. 20.

<sup>o</sup> *Sleech v. Thorington*, 2 Ves. sen. 562.

<sup>p</sup> *Stackpoole v. Beaumont*, 3 Ves.

89.

<sup>q</sup> 3 Ves. 506.

Power given to wife, clandestinely married, to make a settlement on a future husband.

king the husband altogether dependent on his wife, as he would give her even the power of making a settlement upon a future husband ; for in *Winch v. James*<sup>r</sup> his Honour objected to the settlement approved of by the Master, because it did not give the wife a power of settling any thing upon a future husband ; and said, that where a young woman was run away with, he would never consent to tie her up to that marriage, and prevent her from ever marrying again. And in *Wells v. Price*,<sup>s</sup> the husband having no property of his own, it was ordered that her money should be settled, not only on the children of that marriage, but of any future marriage by her, with a power to her to settle upon such after-taken husband, in case he should survive her, any proportion of the dividends, not exceeding a moiety, for his life.

Husband discharged from custody, on undertaking to make the settlement directed.

In the above-mentioned case of *Winch v. James*,<sup>r</sup> it seems to have been settled as a rule of practice for like cases, that the husband should be discharged out of custody, he undertaking, by his counsel, to execute the settlement that had been directed ; for Lord Alvanley observed, upon an application having been made to him to that effect, that he understood that the Lord Chancellor had acted so in *Stackpoole's case*,<sup>u</sup> and he accordingly ordered him to be discharged on such undertaking. But, it must be remembered, that Mr. Stackpoole was discharged from custody expressly because he was in the army, as Mr. Phillips (who was a lieutenant of dragoons) had been discharged in *Green v. Pritzler*,<sup>v</sup> lest he should lose his commission. So that this rule would seem to have been intended originally in favour of officers in the army, whose commissions might have been forfeited by their detention in custody.

If any thing criminal in the mode of obtaining the

But the husband will not in all cases be discharged, upon his undertaking to execute the settlement ; for if there be any thing criminal in the mode of obtaining the young lady, the Court will detain him in custody until he has been

r 4 Ves. 386.  
s 5 Ves. 398.  
t 4 Ves. 386.

u 3 Ves. 89.  
v Amb. 602.

prosecuted. And so his Lordship acted in *Priestly v. Lamb*,<sup>v</sup> where it appeared that Anne Lamb, being a ward of the Court, and being entitled to a sum of between 2000*l.* and 3000*l.* was married by Timothy Priestly, the brother of the mistress of the school, where she had been placed for her education, and that the marriage was had without a due publication of banns. It appearing to his Lordship to be a very base and wicked transaction, he said, that treating it merely as a contempt would not satisfy the ends of justice, and that he would direct the proceedings to be laid before the attorney-general, to sift the transaction, and to see whether any of the parties could be convicted of a conspiracy at common law. As to the fortune, his Lordship added, that it should be referred to the Master to receive a proposal, and upon the circumstances, he was persuaded that the Master would take care that neither Priestly, nor any one belonging to him, should ever touch a shilling of that property real or personal. And when Priestly afterwards presented a petition to be discharged out of custody, on executing a conveyance according to a proposal approved by the Master, his Lordship would not make the order, observing that what remained was with the attorney-general; and his Lordship also expressed his opinion, that, exclusive of the contempt, contriving a marriage by an undue publication of banns was a conspiracy, for which he might and ought to be indicted. So in *Millet v. Rowse*,<sup>x</sup> where James Thomson had married Maria Withers, a ward of the Court, *by license*, to procure which he took the usual oath, he was committed by the Lord Chancellor, who directed that he should be prosecuted. And, having been afterwards indicted, convicted, and pilloried, and imprisoned, he presented a petition, praying that he might be discharged, on executing a settlement according to a proposal approved by the Master. His Lordship, having first directed the kind of settlement which he should execute, said, "When he shall have executed a settlement

ward, husband will not be discharged until he has been prosecuted.

according to these directions, and not till then, let him be discharged." And his Lordship refused him his costs.

Where the husband has committed a breach of trust in obtaining the marriage, the Court has refused to pay his debts out of the accumulation.

And where a trust has been violated, the Court has carried its resentment so far, as not only to put the complete dominion of the lady's fortune in her own power, but has even refused to pay the debts which the husband has contracted in the maintenance of her and her children out of the accumulation. And this was the mode adopted in *Chassaing v. Parsonage*.<sup>1</sup> Chassaing had been one of the trustees under the will of John Thomas, who had bequeathed some property to Anne Clay, (the ward,) and he afterwards eloped with her from a boarding-school, where he was employed to instruct. They went to France, where they cohabited as man and wife ; but did not marry until she attained her age of twenty-one years, as there would have been a forfeiture under the will of a large share of her fortune, if she married under age without the consent of the trustees. After several refusals by Chassaing to make any proposal for a settlement, he, at length, proposed that a sufficient part of the accumulation of the trust funds should be appropriated for the payment of his debts, which he alleged had been incurred by the maintenance of her and her children in a suitable manner, and that the residue should be settled on his wife for her separate use, then on himself for life, with a power to her to appoint to their children, and, in default of appointment, then equally amongst them. His debts were stated to be 1700*l.*, and the accumulation 2000*l.* On a subsequent day his Honour said, "I have read over all the papers, and it is impossible for me to entertain a petition, praying as this does, that the debts of this man shall be paid in that way, giving him completely the fruits of his very improper conduct ; and I cannot by any means authorize, in any degree, such a proposal as he has thought fit to make. The utmost that he could obtain (and I doubt whether I could go so far) would be, that the settlement should be to her separate use for life, and after her death

to her children, with a power to her to give him a part during his life. But, as to paying his debts, incurred under these circumstances, after having carried her away, one of his scholars, and living with her in such a way that his marriage with her would not have been near so great an offence, the attempt is, in my opinion, an insult to the Court. At present, I shall only refer it back to the Master, to receive other proposals, for these are such as I shall by no means accede to." And yet Lord Eldon, in at least as bad a case, in that of *Pearce v. Crutchfield*,<sup>z</sup> allowed 2000*l.* out of the fortune of the wife, which was estimated at 15,000*l.*, to the husband, to pay debts, which, he alleged, had been contracted for the wife, although the husband had been tried and convicted of a conspiracy to procure the marriage. But he released all right to the residue of her fortune, which was settled to her separate use, and on her children, and ultimately at her own disposal. And in *Millet v. Rowse*, cited above, Thomson, the husband, having been pilloried for the fraudulent procurement of the marriage, the only settlement his Lordship would listen to was, that, instead of vesting the fund in trustees, it should stand in the name of the accountant general, where it would be always safe, and that a trust should be declared for the separate use of the wife for life, to be paid to her from "time to time," and not by way of anticipation, during her life; that, after her decease, the capital should go amongst all her children *by this or any other marriage*; if she should die without any children in the lifetime of Thomson, then according to her appointment by will, and, in case she makes no appointment, to her *next of kin*.

However, in *Bathurst v. Murray*,<sup>a</sup> Lord Eldon disapproved of a settlement upon the children of a subsequent marriage, thinking that it ought not to go farther than to give the wife a power by way of appointment, to provide for such a case. His Lordship also said, that he had a strong inclination to give the husband something out of the

Part of the wife's income given to the husband during his life, with a power to the wife to increase it by her will.

<sup>z</sup> 16 Ves. 48.

<sup>a</sup> 8 Ves. 74.

Husband not discharged from custody upon undertaking to make settlement.

Father of husband, proved to have any concern in the marriage, compelled to make a settlement.

Marriage, to be a contempt, need not be legal; marriage *de facto* sufficient.

income, as there could not be much prospect of happiness where the husband has nothing, and the wife has the whole control over the property. *He* ought to have some share during the coverture, and *she* ought to have the power of increasing that by her will. His Lordship also ordered, that in the event of her death in the life of her husband, above the age of twenty-one, and without having made an appointment, the property should go to her next of kin, exclusive of her husband. She would still have the power of giving it to him if he behaved well, and that is all the Court can do in these cases. But his Lordship refused to discharge the husband on the usual undertaking to make a settlement, observing, that he had the rules, and that several of Lord Hardwicke's orders were for close confinement. It appeared from this case, also, that the Court would exercise a jurisdiction to compel the father of the husband, if a man of property, to make a settlement, if it were established that he had any concern in the transaction; and his Lordship said, that Lord Thurlow wished to have acted so in a case where the husband's father was a man of considerable property in the city, but that it could not be made out that he was implicated. As the marriage in this case was celebrated in Guernsey, the Master reported that it was void, and it was ordered that they should be married by banns. But it is not necessary that the marriage should be a legal one, in order to give jurisdiction to the Court, for a marriage *de facto* has been held quite sufficient for that purpose. In *Selles v. Avignon*,<sup>b</sup> it appeared, that the marriage took place in Scotland, and the counsel for the husband having suggested a doubt whether the Court would assume jurisdiction in such a case, Lord Eldon held, that a marriage in fact was sufficient to ground a contempt of the Court. The husband was not committed in this case, although he did not attend upon the first notice, which excited some displeasure in the Court; but his Lordship observed, that his being a foreigner might be some excuse, and ordered him

<sup>b</sup> *Selles v. Avignon*, 6 Ves. 572.

to attend from time to time when required, and forthwith to lay proposals before the Master. The settlement approved of does not appear. But a mere power to the wife to settle upon a future husband, and the children of such marriage, will not be sufficient in all cases; for Lord Eldon held, in *Halsey v. Halsey*,<sup>c</sup> where the husband proposed that his wife should have powers over her real estate, enabling her to provide for a second husband and the children of a second marriage, but that it had not been considered that she might lose her husband and marry again before she attained her age of twenty-one, and that she could not execute powers over her real estate during infancy.<sup>d</sup> It is not, however, every case of the marriage of a female ward of the Court of Chancery without consent that provokes punishment to the extent of settling the entire of the wife's fortune upon her and her children, and of giving her a power to provide for a future marriage. No doubt, in all cases, such a transaction will be treated as a contempt; but a distinction is to be made between a marriage, the sole object of which must have been the possession of the ward's fortune, and a marriage where there is an equality of rank and circumstances between her and her husband. If a mere adventurer, without a guinea to contribute to the expenses of a family, marries without consent a young woman, whose tender years have placed her under the protection of the Court, we have already seen that her fortune will be placed beyond his reach, by being settled to her separate use for her life, and after her death upon her children by that or any other marriage; but if he adds to the contempt of such an unequal marriage, the crime of having obtained it by a conspiracy with others, or by a fraud in the celebration of it, it appears that not only the contempt will be punished with imprisonment, and the usual disabilities inflicted upon him with respect to her property, but that also a criminal prosecution will be ordered, and he will be fined or imprisoned, or perhaps

Where there is an equality of rank and circumstances, the settlement required will be different.

<sup>c</sup> 9 Ves. 472.

<sup>d</sup> *Hearle v. Greenbank*, 1 Ves. sen. 298. 3 Atk. 695.

Adultery of wife clandestinely married, does not prevent her right to the usual settlement.

pilloried, according to the nature and extent of his offence. Still, however, the punishment of the contempt is matter of sound discretion in the Court, which will be regulated by the circumstances of the case, and a difference of treatment will be observed in the terms to be imposed, and in the security to be required, between the cases, where all the fortune is on the side of the lady,<sup>e</sup> and where there is an equality of circumstances. In the latter case, although the contempt in marrying the ward without consent will be punished, yet such a settlement by the husband of his own property, as in ordinary cases would be deemed adequate, will satisfy the expectations of the Court. The doctrine upon this subject was laid down by Lord Eldon very much at length, and with great consideration, in the case of *Ball v. Coutts*,<sup>f</sup> which was heard under very peculiar circumstances, Mr. Lee having married the minor Miss Ball in 1806, and the Court not having had information of the marriage for eight years after it had occurred. The Master reported that the marriage was had without consent; that the husband had on his marriage, in consideration of the minor's fortune, conveyed considerable real and personal estates of his own to trustees in trust to pay 300*l.* *per annum* to her for pin-money, during the joint lives of husband and wife, and the residue to the husband, in case of her surviving him, then 500*l.* *per annum* to her, and the whole yearly proceeds to him, if he should survive her; and as to the principal, for the children of the marriage after the deaths of the parents, equally with survivorship, subject to the joint appointment of the parents, or in default thereof, to the appointment of the mother surviving. There were a son and a daughter of the marriage, and Mr. Lee having instituted a suit in the ecclesiastical court against his wife for adultery, a sentence of divorce and separation *à mensâ et thorâ* was pronounced. The Master also reported that he was satisfied with the settlement, excepting the pin-money which he thought too small a provision at the time, consider-

<sup>e</sup> *Halsey v. Halsey*, 9 Ves. 472.

<sup>f</sup> 1 Ves. & Beam. 292. *Ball v. Coutts*.



ing her fortune, and that 600*l. per annum* ought to have been allowed ; submitting, at the same time, whether since the divorce, it ought to be increased. Mrs. Lee objected to the report, and insisted that as Mr. Lee had married her clandestinely, the entire of her fortune in reversion and expectancy ought to be secured to her and to her issue ; but the Master having overruled the objection, Mrs. Lee presented a petition that he might be directed to review his report, and that the settlement might be declared not to be a proper settlement, stating many circumstances of aggravation on her husband's part ; amongst others, that he had treated her cruelly, and deserted her, and that she had received no money from him for the last three years. Mr. Lee also presented a petition, praying a declaration that the settlement was proper, and that his wife's fortune might be transferred to him, and denying the several charges of Mrs. Lee's petition. The counsel, in support of her petition, contended, that, under the circumstances of this case, the whole fortune ought to be settled to her separate use, and upon her issue, excluding her husband from any share in it. On the other side, Mr. Lee's counsel relied on the equality of the parties in rank and fortune, the husband having actually settled 1000*l. per annum* of his own property. His Lordship, Lord Eldon, delivered his judgment very much at length, in which he detailed the principles and practice of the Court of Chancery on this interesting object of its jurisdiction. The case itself is an illustration of almost all these principles. It establishes, that marriage with a female ward of the Court, without consent, is a contempt punishable, and usually punished by commitment ; and that lapse of time, though it may soften the rigour of the punishment, does not weaken nor destroy the jurisdiction of the Court ; that the Court will always interpose upon a complaint made of such a proceeding, but that a complaint is not necessary to call its resentment into activity ; information acquired in any way will be sufficient ; that where the match is very unequal, the money of the wife will be put out of the reach of the husband who speculated

upon it ; but that where the rank and fortune of the parties are nearly equal, an adequate settlement by the husband of his own fortune will be a purchase of the wife's.

It is to be remarked of this case, that it also proves that the adultery of the wife, married in this way, does not bar her right to call for a settlement, although if she had been married with consent, or had been adult when married, such conduct on her part would be an insuperable obstacle to her attaining her equity. This also appears, that the pin-money settled on the wife after such a marriage, not only will not be discontinued by her adultery, as in ordinary cases,<sup>2</sup> but that it will be even increased in proportion to the fortune she has brought. And these anomalies in the practice are an illustration of the principle upon which the Court of Chancery acts on such occasions, for they prove that such settlements are intended as a punishment on the husbands for their violation of the rules of that jurisdiction, not indeed for the benefit of the individual wives who are the objects of such provisions, but for the protection of the future wards of the Court.

<sup>2</sup> Carr v. Eastabrooke, 4 Ves. 146

## CHAPTER XII.

OF THE EQUITY OF THE WIDOW TO BE RE-IMBURSED OUT OF HER HUSBAND'S ASSETS, WHERE SHE HAS PLEDGED HER REAL ESTATE OR ADVANCED HER SEPARATE PERSONAL PROPERTY FOR HIS DEBTS, AND OF HER RIGHT TO REDEEM.

THE subject of the wife's equity, and of the protection afforded to married women who have been deserted or ill-treated by their husbands, and to female wards of the Court of Chancery who have been clandestinely married, which have been treated of in the preceding chapters, are instances of equitable remedies applied for the defence of the wife against the husband in his lifetime. There are other equities springing from the same source, viz. the relation of husband and wife, and relating to the same matter, viz. the property of the wife, which, though they have their origin in his lifetime, cannot be enforced until his decease. Of this description is the wife's right to be indemnified out of the assets of her husband, where she had pledged her real estate, or parted with her separate property for the purpose of supplying his wants, and also her right to redeem the mortgages affecting her dower or her jointure lands. Where the transaction is a mortgage by husband and wife of her real estate, with a view to pay his debts, or to promote his interest, she will be considered in equity as a creditor for the money, and as entitled to have his personal assets applied in discharge of the amount, the Court looking on him as the debtor, and on her land as only an additional security.<sup>a</sup> So where the wife advances or charges her sepa-

If wife join her husband in a mortgage of a real estate for his debt, she will be considered in equity as his creditor:

<sup>a</sup> Huntingdon v. Huntingdon, 1 P. Wms. 347. Lacan v. 2 Vern. 437. Tate v. Austin, Mertins, 1 Ves. sen. 312. Pocock 1 P. Wms. 264. Bagot v. Ough- v. Lee, 2 Vern. 604.

If wife advances her separate property to her husband as a loan, equity will consider her as his creditor.

rate property for her husband's use, intending it as a loan and not as a gift, she will be considered as the creditor, and will be supplied with all the means of enforcing the demand against her husband's estate, which the creditor possessed.<sup>b</sup> Such is the doctrine, which seems to be without exception or qualification. The only question which is agitated in the case on this subject is, whether the intention of the wife was to make a gift to her husband, or whether she meant he should be her debtor for the amount, for which she had pledged or advanced her property. This intention is to be collected from the nature and circumstances of the dealing. If husband and wife join in a sale of the wife's inheritance, of any interest she may be entitled to out of her husband's estate, as her dower or her jointure, the purchase money becomes the property of the husband, and the transaction is not considered to raise a presumption of any different intention on the part of the wife. But, if she join her husband in a mortgage of her estate for his debt, the inference drawn by a court of equity from these circumstances is, that she intends to be repaid; and even though the equity of redemption should be reserved to the husband and his heirs, still there is a resulting trust to the wife after the objects of the mortgage have been satisfied.

If a wife join her husband in a mortgage of her estate for his debt, it will be inferred that she intends to be repaid, though the equity of redemption be reserved to the husband and his heirs.

There are two classes of cases of the subject of these mortgages; first, where the equity of redemption is reserved to the wife, or to her and her heirs, and then the wife's right to redeem is unquestioned, her right to exoneration only being in dispute; and the decisions in this class turn on the question, whether the wife intended a loan or a gift to her husband. The second class is, where the equity of redemption is reserved to the husband and his heirs, and where the wife's right even to redeem the mortgaged premises is questioned, and consequently her right to exoneration is denied; and the result of these cases depends on the question, whether it was the intention of the wife merely to pawn her property to raise money for her husband, or altogether to give it to him.

<sup>b</sup> Parteriche v. Powlet, 2 Atk. 383. Aiguilar v. Aiguilar, 5 Mad. 414.

*Huntingdon v. Huntingdon*<sup>c</sup> is of the former class, viz. where the reservation of the equity of redemption was to the wife and her heirs. The facts were, that Lady Huntingdon joined her husband, Lord Huntingdon, in making a mortgage for years of her inheritance to raise 4500*l.* to pay for the place of captain of the band of pensioners, and, subject to the mortgage, the estate was settled on the Countess for life, remainder to the son in tail ; and *Lord Huntingdon* covenanted in the mortgage deed to pay the money, and the proviso was, that on payment of the money the term was to cease. The mortgage was assigned several times, and particularly in 1683, and the Countess joined in it ; and the proviso was, that on payment by them, or either of them, the mortgage term was to be assigned as *they* or *either* of them should direct or appoint. Four days after the execution of the mortgage, the Earl thanked the Countess, by letter, for having sealed the mortgage, and promised that the profits of the office should be religiously applied to pay<sup>e</sup> off the incumbrance. He afterwards paid off the mortgage, but *took* an assignment of it in trust for *himself*, and afterwards devised the benefit of the mortgage to his *second* wife. The son of the first Countess filed his bill to have the mortgage assigned to him ; but the Lord Keeper declared he could not decree for the plaintiff, except on the usual terms of a redemption on payment of principal, interest, and costs. But on an appeal to the Lords in Parliament, the plaintiff obtained a decree to have the mortgage assigned to him.<sup>d</sup>

Where the equity of redemption is reserved to the wife and her heirs.

It does not appear from this case on what ground the Lord Keeper decided that the heir of the wife was not entitled to an assignment of the mortgage. It is stated, however, in the report by P. Williams, of *Tate v. Austin*, that it was insisted that the money was a gift from the wife to the husband, and therefore not to be refunded. It would seem, however, from the arguments of the respondent's counsel on the appeal before the House of Lords, that it was relied on as evidence of the wife's intention to give the

c 2 Vern. 437. Eq. Ca. Ab. 62. 316. e 1 Pr. Wms. 264.

d 1 Br. P. C. 1.

money to her husband, that the deed of mortgage contained a proviso for an assignment of the mortgage term, as *they*, or *either of them* should direct or appoint, on payment of the money by them, or either of them. In *Tate v. Austin*,<sup>f</sup> also, the equity of redemption was reserved to the wife, and her heirs, and the same doctrine was established by Lord Chancellor Cooper. There the husband, seised in right of his wife, borrowed £500*l.* to purchase a commission in the army for himself, and to secure this sum he and his wife joined in levying a fine of her inheritance, and raised a term of five hundred years, which was limited to the lender of the money, to be void on payment of it with interest, remainder to the use of the wife in fee, the husband covenanting in the deed to pay the mortgage-money. The husband made his will, by which he gave several charities out of his personal estate, and died indebted by simple contract. The widow filed her bill to have this mortgage discharged out of her husband's personal estate, the assets not being sufficient to pay the mortgage-money and the charities. The Lord Chancellor said, "This mortgage is a debt of the husband, which must be paid before the legacies, but all other debts of the husband shall be preferred to this; every thing shall be taken favourably for the wife, who, for the supplying the husband's occasions, has agreed to charge her land with a debt of his." Although it appears from his Lordship's observations in the above case, that all the other creditors of the husband would be entitled to payment of their debts in preference to the wife, still it seems that if the debt had been paid by the husband to the mortgagee, the other creditors would not have a right to stand in the place of the mortgagee to come round on the estate of the wife. And so it was laid down by Lord Hardwicke *arguendo* in *Robinson v. Gee*,<sup>g</sup> where his Lordship also recognised the present doctrine, saying, "it was a common case for a wife to join in a mortgage of her inheritance for a debt of her husband, and after her hus-

<sup>f</sup> 1 Pr. Wms. 264. Eq. Cas. Ab. 62.

<sup>g</sup> 1 Ves. sen. 252.

band's death she is entitled have her real estate exonerated out of the personal and real assets of the husband, the Court considering her estate only as a surety for his debts."

In these two cases there was no doubt that the money raised was the debt of the husband, and there was no ground for presuming that the wife intended any thing more than to pledge her estate for the repayment of it.

So, if the husband pay off the original debt, for which the wife had pledged her estate, and afterwards borrow more money upon the same security, his assets must of course exonerate the estate. This was the case in *Astley v. Tankerville*,<sup>b</sup> where Sir John and Lady Astley levied a fine of Lady Astley's estate, and settled the same with a power to them to revoke and declare new uses. They afterwards join in a conveyance of the premises by way of mortgage for 500 years to secure the sum of 3000*l.*, with proviso of redemption on repayment by the husband, his heirs, executors, or administrators, or such other persons, to whom the freehold and inheritance should belong. The mortgage was afterwards paid off, and the term was assigned to a trustee by Sir John in trust, for such uses as he should by deed appoint, and in default of such appointment to attend the inheritance. Lady Astley was not a party to this deed. Sir John afterwards borrowed a further sum of 3000*l.* on the same estate, and assigned the term as a security, and covenanted to pay the money; and by his will directed that his personal estate should be applied in discharge of his funeral expenses, debts, and legacies. Lord Thurlow held that the settled estate was not chargeable with the second sum of 3000*l.* His Lordship's judgment is not given by either of his reporters, but it is clear that there was this good ground for it, that Lady Astley not having joined in the second mortgage, Sir John had no power to charge the lands; besides, if Lady Astley had joined in the second mortgage, and had made the estate liable, still she would have been entitled to the usual equity

If husband pay off original debt for which the wife had pledged her estate and then borrow more money upon the same security, she must be exonerated.

<sup>b</sup> 3 Br. C. C. by Eden, 545: 1 Cox's Rep. 82.

of a married woman, who mortgages her estate for the debt of her husband, namely, to be indemnified.

If wife once charge her land by fine for the debt of her husband, she may increase the charge by agreement, without fine.

In this case it appears that Sir John and Lady Astley reserved to themselves in the deed, to the uses of which the fine was levied, a power to revoke the declared uses and to limit new ones, and therefore that she might have joined in the second mortgage without the aid of a fine. It seems, however, that even, if a fine had been strictly necessary to give validity to the second charge upon her estate, still, if she had joined in the conveyance without a fine, that a court of equity would have held the second sum of 3000*l.* to be a valid charge upon the lands. This principle is to be collected from the case of *Rayson v. Sacheverel*.<sup>i</sup> There Sacheverel and his wife, seised of lands in her right, by fine and deed mortgaged them for 340*l.*, of which 200*l.* was afterwards paid off, and the mortgagor having occasion for a further loan, did accordingly borrow a further sum from the mortgagee. The payment of the 200*l.* was indorsed on the deed, and an agreement was also written on it, subscribed by husband and wife, that the land should stand charged with the money, and the wife, with the consent of her husband and other parties interested, made a will and divided the lands in question to her daughter and her heirs, to be sold for the payment of her debts, and the mortgagee's debt in particular. The wife died without having levied any new fine on the second loan. The mortgagee filed a bill of foreclosure against the heir of the wife, and the Court decreed that the mortgagee having the estate in law in him by the forfeiture of the mortgage, he should hold the land against the heir of the wife, until the whole money was paid, and if the heir would not pay in the whole principal, interest and costs, he should be foreclosed. This case is no authority on the subject of the wife's right to have her estate exonerated out of the husband's assets, she having charged it for his debt; for the question in it was merely between the mortgagee and the heir at law, parties between

<sup>i</sup> 1 Raithby's Vern. 41.    2 Cas in Chan. 98.    Eq. Cas. Ab. 62. pl. 3. 324. pl. 2.



whom the subject of exoneration could not have been litigated, as the former was entitled to be paid his money, whether it had been raised for the debt of the husband or of the wife, provided the wife had charged her estate properly. The case is mentioned here for the purpose of showing that where the wife had once charged her land by fine for her husband, she may afterwards increase the charge by a mere agreement without any fine. So in an anonymous case in Mosely,<sup>j</sup> it was held that an answer by a married woman was equivalent to a fine for the purpose of binding her inheritance. The facts were, that an estate had been purchased in trust for the husband and wife, and their heirs, and husband and wife joined in a mortgage to the vendor, to secure 500*l.* part of the purchase money; the mortgagee brought a bill of foreclosure, and the husband and wife put in a joint answer. The husband died, and now a motion was made on the part of the wife, that she might amend her answer, put in by coercion during coverture, and insisted on the mortgage not being obligatory on her, because no fine was levied. But the Chancellor said, "I shall not grant this motion; for though the mortgage is insufficient in law, I shall consider it as a good mortgage, since the wife does not pretend she was any ways imposed on, and an answer in this Court has been adjudged equal to a fine." Here, too, there was no question as to the right of the wife to an exoneration of her estate out of the assets of her husband, the doubt was as between her and the mortgagee, whether her land was bound by the mortgage deed without a fine.

If wife join her husband in a sale of their inheritance without fine, and admit the facts by her answer, she will not be afterwards allowed in equity to rely on the want of a fine.

But to entitle the wife to this equity, the money must have been raised for the use of the husband, or, in other words, it must have been for the discharge of his debt, for, if not, she will not have a right to exoneration out of assets, even though he had expressly covenanted to pay it. Accordingly, where the wife mortgaged her estate for the purpose of discharging a debt, to which the husband was a stranger, it

Wife not entitled to this equity, unless she

<sup>j</sup> Mosely, 249.

has charged her land for the debt of the husband.

has been held that she has no right to be reimbursed out of his property. This was ruled in *Bagot v. Oughton*,<sup>k</sup> where it appeared, that Sir Thomas Wagstaff had mortgaged part of his estate for the sum of 3500*l.*, for the purpose of raising part of the portion of his daughter, who married Sir Edward Bagot. Sir Thomas died, leaving Lady Bagot his daughter and heir. She afterwards joined Sir Edward Bagot in a deed and fine, whereby she settled her estate on her husband and herself, and the heirs male of the body of her husband. The mortgagee wanting his money, Sir Edward joined in an assignment of the mortgage, and covenanted that he or his wife, or one of them, would pay the money. Sir Edward died, and his Lady married Colonel Oughton, and died. And the question was raised, Whether, by reason of the covenant from Sir Edward for the payment of the 3500*l.* mortgage money, his personal estate should be liable to pay the same? And Lord Chancellor Cooper decreed, that this covenant by Sir Edward should not oblige his personal estate to go in case of the mortgaged premises; forasmuch as the debt being originally Sir Thomas Wagstaff's, and continuing to be so, the covenant upon the transferring the mortgage was an additional security for the satisfaction only of the lender, and not intended to alter the nature of the debt. The reporter of this case adds, "From hence it may be inferred, that if a *feme sole* makes a mortgage, and receives the money, and marries, and then the mortgage is transferred, the husband joining in the assignment, and covenanting to pay the money, the wife or the heirs of the wife, upon the death of the husband, shall not compel an application of the husband's personal estate for the payment of this mortgage money. *Secus*, if the husband had received this money."

So that it is one of the necessary ingredients to constitute this equity of the wife, that the money should be for the use of the husband; and, if it be not for him, his covenant to pay it will be no evidence of an intention that his

assets shall be applied in discharge of it. And accordingly, where it appears that part of the money raised by the mortgage of the wife's estate was for the debt of the husband, and part for the debt of the wife, it was ruled that she had no right to have her estate exonerated out of her husband's assets for so much as was raised for her own use, but for that part of the money only, which was for the use of the husband. This was the case of *Lord Kinnoul v Money*.<sup>1</sup> There Miss Earl had a real estate, which was itself subject to a certain extent, and the general estate of her father, subject to the amount of 2500*l*. Before her marriage it was mortgaged to Wyatt for that sum, being her own debt, or, more properly, that of her ancestor. After the marriage, when it was settled in very strict settlement, with only a power after the limitations for life and in tail (which limitations in tail were gone by the death of the son, while an infant), to charge by will and to act upon it, during coverture, as fully as any woman could receive such power by settlement. The husband had occasion to raise 3000*l*. upon the estate; which was done by fine, and not by virtue of the power, for then it would not have affected it in his life, nor indeed in hers; but that sum was afterwards raised for his benefit; and then a mortgage was made for the whole sum, which was 7000*l*. and 1000*l*. interest incurred, in all 8000*l*. This was expressed to be done by virtue of her power. Lord Hardwicke referred it to the Master to see what was raised for the wife's debt, and what for the husband's use. In 1767, before the report, it came on for a rehearing before Lord Camden, and they insisted that the reference was wrong; but worse than that, that there ought to have been an immediate decree, and the whole ought to have been charged on the estate of the wife. But Lord Camden saw no reason to overturn that interlocutory decree, and, therefore, at his recommendation, they agreed that it should be confirmed, and the cause to stand for further directions. And he confirmed the decree *in omnibus*,

Where wife joins her husband in a mortgage, partly to discharge a debt of her own and partly of his, she will be entitled to be reimbursed out of her husband's assets only to the amount of his debt.

<sup>1</sup> Stated by Lord Thurlow in *Clinton v. Hooper*, 1 Ves. jun. 186., and reported at length in a note in 3 Swans. 202.

and particularly said, that the wife's estate was not to be subject to any part, except what was for her, and that *Lewis v. Nangle*<sup>m</sup> turned upon different circumstances, and not upon the general principle.

If wife's estate be settled at the same time that she executes a mortgage, partly for her husband's debt, and partly for her own, she will not be entitled to exoneration for any part of it.

But there may be circumstances under which, although part of the money raised be for the use of the husband, and part for the use of the wife ; yet she shall not be entitled to the exoneration of her estate, from any portion of it, if a new settlement be made of her estate at the same time with the mortgage. This was the case of *Lewis v. Nangle*,<sup>n</sup> referred to by Lord Thurlow in the preceding case. The facts were these : Mrs. Nangle was, before her marriage with the defendant, indebted to sundry persons, and entitled to the inheritance of lands, charged with the payment of sundry sums, and on her marriage she entered into articles, whereby the premises were to be settled to the husband for life, sans waste ; remainder in like manner to the wife ; remainder to the issue of the marriage ; remainder to the wife in fee. The marriage took effect, and the husband being pressed for payment of the wife's debts, and having also occasion for a further sum of money, they borrowed 1300*l.* of the wife's sister, (the original plaintiff in the cause,) and secured it by a mortgage of the wife's estate, and the husband covenanted for payment of the whole money, and also executed a bond conditioned for payment of the money, according to the provisos in the mortgage. Subject to this mortgage, the lands were settled to the husband for life ; remainder to the wife for life ; remainder to the issue of the marriage ; remainder to the wife's sister (the mortgagee) in fee. Mrs. Nangle died without issue, and the present plaintiff was the devisee of the sister, who brought his bill against Mr. Nangle for payment of the mortgage money ; but the Lord Chancellor held, that although part of the money was raised for the husband's use, yet the mortgage being a single transaction, he must suppose the intention of the parties to be uniform, and that such intention was to

<sup>m</sup> Amb. 150. 2 P. Wms. 664. in the notes.

<sup>n</sup> Ibid.

charge the wife's estate with the whole debt ; and his Lordship dismissed the bill so far as it sought to compel the defendant, Nangle, to exonerate the land, but directed him to keep down the interest during his life. Now, the circumstances which distinguished these two cases, and which seem to have led to the difference in the decisions, are these: in *Kinnoul v. Money* the execution of the mortgage and the settlement of the wife's lands, were separate and unconnected transactions, the settlement being first made, and the mortgage containing no clause, and being unaccompanied by any facts which afford ground for inferring an intention in the parties different from the usual supposed equitable agreement ; namely, that the husband should exonerate the wife's lands from the claim to which she had concurred in making it liable for his debt ; but in *Lewis v. Nangle*, the settlement and mortgage were made at the same time, and formed part of one arrangement, the former referring to the latter. It is also to be observed, that the settlement differed from the articles entered into before the marriage, in this respect, that by the latter it was agreed that the ultimate limitation in fee should be to the wife, whereas, by the settlement, it was limited to the wife's sister who was the lender of the money. In addition, the settlement was made *subject to the mortgage*, the greater part of the money was to pay the debts of the wife, and therefore, was manifestly not intended to be accounted for by the husband to the wife's estate.<sup>o</sup> The bill was dismissed, so far as it sought to compel the husband to exonerate the estate, and the decree directed him to keep down the interest for life. His Lordship thought, that, as the money was borrowed at the time the settlement was made, it was part of the contract made with the wife ; that it applied to the mortgage, and that he could, in that case, make no distinction between the one contract and the other.<sup>p</sup> So that it seems the question in this case, as in all the preceding ones on the same subject, was,

<sup>o</sup> See the report of this case by A mb. 150.

<sup>p</sup> See Lord Thurlow's judgment in *Clinton v. Hooper*, 3 Br. C.C. 211.

What was the real agreement of the parties? and the circumstances were such as to lead the Court to infer an intention that the wife's estate should not be exonerated.

Wife barred of this equity if she waive it after husband's death.

So, although the debt be the husband's and the wife have mortgaged her estate as a security for the repayment of it, still, if after his death she waive her right to exoneration, she will be bound by the waiver, and barred of this equity. Such was the decision in *Clinton v. Hooper*.<sup>q</sup> In this case the plaintiff, the widow of William Clinton, filed a bill to have her estate exonerated by the estate of her husband, from a mortgage made by her and her husband, and for which he received the money. The facts were, that plaintiff's husband having occasion for the sum of 700*l.* for the purchase of an estate, he prevailed on her to join him in selling some part of her real estate, and in a mortgage of her copyhold for the sum of 1500*l.* which he received, and applied to the purchase. Her consent was obtained by a promise to settle the estate which was to be purchased, to the same uses to which the plaintiff's estate was settled; but this was never done. Plaintiff's husband died, having devised the purchased estate to his nephew, and left effects more than sufficient to pay his debts. The devisee answered the bill, and contended, on two grounds, that plaintiff had no right to have her estate exonerated. First, that there was an agreement between plaintiff and her husband, that her estate should continue liable; secondly, supposing the agreement void, being during coverture, that it was confirmed by her since his death. The answer set forth that it was a voluntary gift by the plaintiff to her husband of the money, in order to enable him to complete the purchase, which had been made at her request, and that the plaintiff had admitted, on one occasion, that it was agreed between her and her husband, that the 1500*l.* should be paid out of the estate charged therewith, and that she had agreed to sell the same for that purpose; that since his death she had been advised to claim the 1500*l.* from his

assets, but had relinquished that idea, and did not desire it, and requested the defendant to pay the legacies given under the will, and pressed him to sell the estate for that purpose. The counsel for the plaintiff insisted that this case was within the general rule, that where the wife's inheritance is mortgaged for the debt of the husband, she shall be a creditor upon the husband's assets to the amount. On the part of the defendant this rule was admitted; but the counsel contended, that this right of the wife might be repelled by circumstances; that by her acts she had shown she intended the money as a gift to her husband; that she had relinquished her claim, and had permitted the executor to go on borrowing money to pay the husband's debts; and that it ought to be referred to the Master, whether it was to be considered as a loan or bounty; that parol evidence of her declarations was admissible, it was evidence to rebut a presumption or an equity; and parol evidence was admitted by Lord Thurlow to prove the above declarations and acts of the plaintiff. His Lordship ruled, that in this case the plaintiff had, by her declarations to the executor, clearly disclaimed her right; and his Lordship added, that he did not think it material, whether the legatees were paid before or after this concession. "I cannot (said his Lordship) distinguish this case from the case of the heir; for if the heir will tell the executor to pay the legacies, and that he will not press him for the exoneration of his estate, and the executor pays upon that assurance, the executor shall not be called on afterwards, or the legatees be obliged to refund. It would be contrary to the rules of equity to say, that the heir should not be barred by such a concession from his claim; it would be countenancing, as it were, a mere fraud upon the executor, if the heir was allowed to call upon him after such a disclaimer."

It appears from the preceding cases, that where the nature of the transaction is simply a mortgage by husband and wife of the wife's estate for the debt of the husband, the inference drawn from these facts by a court of equity, is, that the wife intended to be repaid out of his assets; but

Wife has a resulting trust in estate mortgaged for the debt of husband, though equity of redemption should be reserved to him and to his heirs.

Rule as to effect of mortgages by husband and wife, either of his estate or of hers, upon the equity of redemption.

another question, in addition to this of the wife's right to exoneration, often arises in cases of this description ; namely, whether the wife has any resulting trust in the mortgaged premises after the term has expired, or the money has been repaid ; and this, like the question of exoneration, depends altogether on the intention of the parties ; as the wife may join as a security for her husband's debt, and intend that her own estate shall be the fund out of which the creditor shall be repaid, so she may also intend to bar herself and her heirs of any future interest in the mortgaged estate. If, however, the transaction be merely a mortgage by husband and wife of her estate for the debt of the husband, she will not be deprived of a resulting trust in the lands, even though the equity of redemption should be reserved to the husband and his heirs ; notwithstanding such reservation, the previous rights of the parties will remain unchanged. The established rule upon the subject of mortgages by husband and wife is, whether it be the estate of the husband or of the wife, if she join in the conveyance, either because the estate belongs to her, or because she has a charge by way of jointure or dower out of it, and there is a mere reservation in the proviso for redemption of the mortgage, which would carry the estate from the person who was the owner at the time of executing the mortgage, or where the words admit of any ambiguity, that there is a resulting trust for the benefit of the wife or for the benefit of the husband, according to the circumstances of the case. This doctrine of a resulting trust in the wife, where she has joined her husband in a mortgage of an estate, on which she had a charge as jointress or dowress, seems to have been first applied in *Cotton v. Cotton*,<sup>r</sup> which was heard before Mr. Justice Windham, for the decree contains the following passage : “ And as to the mortgage made to Perkins by the said Nicholas and the defendant, his relict, it appearing that part of the mortgaged lands was, before that mortgage was made, settled on the said Nicholas and Catherine in jointure or otherwise.



so as the same came to her as survivor, this Court is of opinion, that the equity of redemption belongs to her as survivor, and not to the plaintiff," who claimed it as heir to Nicholas, her husband *Broad v. Broad* is the next case on the subject. The facts were, the husband of the plaintiff had settled, *inter alia*, houses in Bread-street, value 350*l.* *per annum*, to the use of himself for life, remainder to the plaintiff for her jointure, with remainder over. The houses were destroyed by fire in 1666, and then the husband and wife borrowed 1500*l.* to build upon the ground, and levy a fine, *sur concessit*, for ninety-nine years, if the wife should live so long; and a deed is made between the conusee and the husband, wherein the husband covenants to repay the mortgage money with interest, and the equity of redemption is limited to the *husband* and *his heirs*, but the wife is no party to this deed. The husband expends a large sum of money in building on this ground, and dies. The question was, whether the jointress or the heir of the husband should redeem. Lord Chancellor Nottingham had decreed it to the wife; and on a bill to review, to which there was a demurrer, the Lord Keeper was of the same opinion, because the wife was no party to the deed by which the redemption was limited to the husband; and for the wife being a jointress, and having granted a term for years only out of her separate estate for life, there rests a reversion in her, which naturally attracts the redemption. His Lordship added, if the cause had come originally before him, and there had been assets sufficient, the husband having covenanted to pay this money, he would have decreed it clear to the wife. It was as little as a husband could reasonably do, to rebuild the houses, and put his wife's jointure in as good a plight as it was before, and therefore allowed the demurrer to the bill of review.

The question as to the wife's right to exoneration was not discussed in this case, probably because the husband had no assets out of which her jointure could have been exo-

nerated. The question was between the heir of the husband and the wife only as to the right to redeem the premises, which was decreed to the latter, although the redemption had been limited to the husband and his heirs. But it appears from the observations of the Lord Keeper, that if the wife had sought for indemnity out of her husband's assets, it would have been decreed to her.

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So in *Ruscombe v. Hare*,<sup>1</sup> it was held by the House of Lords, affirming the judgment of the Court of Exchequer, that the mere circumstance of the equity of redemption of the wife's estate being reserved to the husband and his heirs, is no evidence of an intention in husband and wife to bar her of her right to redeem, and that the husband has the equity of redemption merely in right of his wife, as he held the legal estate before the mortgage. The facts were these: Nicholas Hare being seised in fee simple of the lands in question, in 1749. mortgaged them by lease and release to William House, for 800*l.*, at 4*l* 10*s* *per cent.* interest, and there was a covenant to levy a fine, the uses of it to enure to House, his heirs and assigns, subject to the proviso for redemption, and the fine was accordingly levied. In 1762, Hare, by a deed poll. mortgaged the estate to House for a further sum of 450*l.* at the same rate of interest. In 1757, Hare devised all his lands to his wife, and made her his executrix as well as devisee, and residuary legatee. After the death of Hare, his wife married Alexander Brusford and in 1766 Brusford and his wife, by indentures of lease and release uniting the former mortgages, and witnessing that for the better securing the said sums of 800*l.* and 450*l.*, with interest for the future at the rate of 5*l.* *per cent. per annum*, they granted the same premises to House, discharged of the former proviso for redemption, but subject to another proviso; that on payment by Brusford of the two sums amounting to 1250*l.*, and interest at 5*l.* *per cent.* at a certain day, House should reconvey the premises to Brusford, the husband, his heirs and assigns for ever. Mrs.

<sup>1</sup> 6 Dow's P. Rep. 1.

Hare died in 1794, and her husband afterwards sold the premises to the defendant, Ruscombe, and died in 1799. The bill was filed in the Exchequer by the heir at law of Mrs. Hare against the purchaser, the representatives of the husband and the mortgagee for redemption; and in 1813 the Court decreed the plaintiff entitled to redeem, from which decree the purchaser and the representatives of Bruford appealed. It was argued for the appellants, that this was not like the case of pledging the wife's estate for the debt of the husband, but it was the case of a husband binding himself to pay the debt of a wife, and that it might be presumed that the wife in consideration of his making himself so liable, intended to transfer to him the equity of redemption. To this argument Lord Eldon's answer was, that in this case, if there were no assets of Hare, the debt was not the debt of either husband or wife; that, if there were no personal assets, the debt was charged only on the real estate, and if the testator had other real estates, his covenant would have bound the other real estates, but the wife would not be the debtor; that the sole purpose of the fine mortgage was, the better securing the payment of the principal, and varying the rate of interest; that there was no recital, no special circumstance, from which it could be concluded that the real intention was to make a new settlement of the estate, or to show that the intention was to go beyond the purpose expressed in the deed; nothing to take it out of the rule, that where the husband is seised of the legal estate *jure uxoris*, and husband and wife join in a mortgage of the estate, reserving the equity of redemption to the husband and his heirs, the husband has the equity of redemption, as he before had the legal estate, *jure uxoris*. And the decree was accordingly affirmed.

It is to be observed of the above case, that the question of exoneration did not arise in it, the debt being neither that of the husband nor of the wife, but of the estate only, and the heir of the wife merely seeking the right of redemption. But it is evident, that if the debt had been the

husband's and the equity of redemption reserved to him and his heirs, not only the right of redemption would have been decreed to the heir of the wife, but the assets of the husband would have been held to be liable to the exoner-  
ation of the estate to the extent of his debt.

Where the equity of redemption is reserved to husband and wife, and their heirs, it does not bar wife's equity to be exonerated.

As the reservation of the equity of redemption to the husband and his heirs will not rebut this equity, it follows *a fortiori*, if it be reserved to both husband and wife and their heirs, that such reservation will not raise a presumption against this claim. So it was in *Pocock v. Lee*,<sup>u</sup> where the husband and wife made a mortgage of the wife's estate, the husband covenanted to pay the money, but the equity of redemption was reserved to them and their heirs. The husband died and made the defendant, his executor. The question was upon exceptions to the Master's report, whether the mortgage money should stand charged upon the land, or the land be exonerated out of the husband's personal estate. The Court held, that the husband, having had the money, is in equity the debtor, and the land is to be considered but as an additional security. However, in a modern case, *Corbet v. Barker*,<sup>v</sup> where husband and wife joined in a mortgage of the wife's estate for the husband's debt, and the equity of redemption was reserved to the husband and wife and their heirs, the bill of their son, who claimed the estate, as heir to his mother, subject to the mortgage, was dismissed. There was no argument in the case founded on a resulting trust to the wife, nor do the counsel on either side seem to have made the slightest allusion to it. Baron Thompson alone adverted to the rule on the subject, for his Lordship said, in reply to one of the defendant's counsel, "It has often been ruled, that a reservation of this kind (of the equity of redemption to the husband and wife and their heirs), in a fine levied completely *diversa intuitu*, shall not, without an express declaration of such intention, carry the estate in a new channel, not even if it had been to the husband and his

<sup>u</sup> 2 Vern. 604.

<sup>v</sup> 10

<sup>v</sup> 1 Anst. 138.

heirs only." However, notwithstanding this decision, there is no doubt that the preceding authorities remain unshaken.

Such is the effect of a reservation of the equity of redemption to the husband and his heirs, or to the husband and wife and their heirs, when the case is that of a mortgage by husband and wife of her estate. But if the transaction be intended to be something more than a mere mortgage, of this kind, if there be any purpose, beyond that of the mortgage, manifested by the provisions of the deeds, by which the object is to be effected, then the wife will not have a resulting trust, and the estate will descend according to the limitations of the instruments. The rule laid down by Lord Redesdale in delivering his opinion in the House of Lords in the case of *Jackson v. Innes and Others*<sup>1</sup> is, that "where the declaration of the uses of the fine refers simply to the operation of the deed as a mortgage, where it is simply a declaration that the money being paid, the fine shall enure to the persons who make the mortgage, and there is nothing else which makes it subject to redemption, that would be considered as a mere clause of redemption, and construed in the same way. But where the form of the equity of redemption has nothing to do with the limitations of the estate, where the limitation of the estate is perfectly distinct, there the wife shall not have a resulting trust." As, for instance, where the equity of redemption was reserved to husband and wife, or either of them, or their heirs, executors, &c., and a fine was levied, which was to enure to husband and wife, and the longest liver of them, and then to the right heirs of the husband, such limitation has been considered as affording evidence of an intention to make a settlement of the estate distinct from the mortgage, and was held to rebut the equity of the wife to redeem as against the heir of the mortgagor, her husband. So it was in *Rowel v. Whalley*,<sup>2</sup> where husband and wife mortgaged lands settled on her for a jointure by a former husband, who had

When the reservation of the equity of redemption is distinct from the declaration of the uses of the fine, there the estate goes according to the limitations in the latter instrument.

<sup>1</sup> 1 Bligh, 128.

<sup>2</sup> 1 Rep. in Chan. 218.

also devised to her the inheritance in them. (1) The husband covenanted in the deed of mortgage that he and his wife would make better assurance by fine; and in the same deed was a proviso, that if the money were paid at the appointed time, the fine should enure to the husband and wife, and the longest liver of them, and after to the right heirs of the husband for ever; and a fine was accordingly levied. The husband died, and on a bill by the wife to redeem against the heir of the mortgagee, and also of the husband, the mortgagor, the Court held that the plaintiff and the heir of the mortgagor should proportionably pay what was due upon the mortgage at the time of the death of the mortgagor, rating her estate for life at one third, and the reversion in fee of the infant, the heir of the mortgagor, at two thirds from the time of the mortgagor's death. From this judgment it appears that the Court considered the special reservation of the equity of redemption to husband and wife, and the survivor of them, remainder to the right heirs of the husband, to be a new settlement of the estate, quite independent of, and unconnected with the mortgage, and showing that no resulting trust was intended for the wife.

*Innes v. Jackson* is a further authority in support of the principle, that where the mortgage by husband and wife of the wife's estate is accompanied by a new settlement of the mortgaged premises, it takes away the resulting trust, which belongs to the ordinary transaction, and consequently rebuts the presumption of an intention that the lands shall be exonerated out of the husband's assets. In this case Richard Jackson and Anne his wife were seised under their marriage settlement of certain lands to them successively for their lives, remainder in strict settle-

(1) It does not appear distinctly in the Report, that the wife had any estate in the mortgaged premises beyond her jointure, but she must have had an estate of inheritance in them, otherwise they could not have been settled by her on the heirs of the mortgagor.

ment, remainder to the heirs of the wife. The settlement empowered Jackson and wife, during their joint lives, by any deed under their hands and seals, to alter or revoke all or any of the uses before limited of said farms, and to limit any new uses in lieu thereof. All the issue died during the lives of their parents. In 1745 Jackson and wife demised these lands for one thousand years, to be void on payment by Jackson and his wife, or either of them, their or either of their heirs, executors, administrators, or assigns, of 200*l.*, lent to Jackson by Child, with interest. Jackson afterwards borrowed 400*l.* from the same person, which sum also was charged on the same premises for the residue of the terms, with a similar proviso for redemption by Jackson and wife. They also covenanted to levy a fine, which it was declared should enure to Child during the term, subject to the said proviso ; and after the expiration or sooner determination of the term, to the use of Jackson and his wife for their lives, and the life of the survivor ; and after both their deceases, to the use of the heirs of their bodies ; and for default of such issue, to the right heirs of the survivor of Jackson and wife. A fine was levied accordingly. Jackson afterwards discharged the mortgage, and took an assignment of the term, and a reconveyance of the estate to himself. Mr. and Mrs. Jackson died without issue, he having devised the mortgaged premises in fee simple. The bill was filed by persons claiming under the heir at law of the wife, praying an account and redemption, and a reconveyance by the devisee of Jackson, suggesting that the reservation of the equity of redemption to the survivor of Jackson and Anne his wife, was a mistake of the conveyancer, or an imposition on the wife, as she had no intention of parting with the inheritance of her estate further than to assist her husband in making a security to Child for the loan of the 400*l.* Lord Eldon held that there was a resulting trust to the heirs of the wife. His Lordship stated the doctrine of the Court to be, that if the intention is to make a mortgage of the wife's estate, that intention shall govern

the parties, and the equity of redemption shall belong to the person who had the estate before, so as to give back the inheritance to those from whom it came. That the question was, whether, taking the whole transaction together, any thing more was meant than that it should be a mortgage transaction ; whether there was apparent on the face of the deed a declaration of intention to do something more than to make a mortgage, or that clear manifestation of such intention, which might be represented as equivalent to such a declaration. His Lordship added, " My opinion is, that there is not ; that there is no part of this deed which shows any purpose beyond that of making a mortgage."

There was an appeal from this decrec to the House of Lords, upon the ground that the decision was not justified by the authority of the cases, in which reservations of the equity of redemption to persons, having no previous interest, have been considered as resulting trusts for the previous owners of the estates.

Lord Redesdale, having stated the different cases belonging to the subject, supported the appeal, on the ground that the operation of the deed, as to the mortgage term, and the operation of the deed as to the limitation of the fee, were wholly distinct, and did not in any way depend on each other. That the term and the fee were kept distinct in the deed. That the term being at an end by the payment of the money, the operation of the deed, so far as it declared the limitation of the estate, subject to the term, remained perfectly distinct, and had no connection whatsoever with the existence of a term, which then would have ceased to exist. That the right of redemption must be discovered from the title, which the deed itself declares to be in the husband and wife for their respective lives, then to the heirs of their bodies, and then to the survivor in fee. That according to the mode in which this settlement had been made, there is no connection whatever in legal operation between the mortgage and the new limitations contained in the deed, which are distinct in form and substance, expressly providing for a subject which was not included



in the mortgage. They limit the reversion in fee, while the mortgage is confined to the term of 1000 years. Lord Eldon said, that the circumstances of this case were, certainly, in point of fact, much better understood than they were, and much greater research had been made into cases so as to bring before the consideration of the House the true principle of decision; that the Court below did not rightly apprehend the case; that on looking into the cases which had been referred to, he was of opinion that the decree ought to be reversed. And it was accordingly reversed. *Reeve v. Hicks*<sup>2</sup> has been since decided on the same principle. There husband and wife seised in fee in right of the wife demised by way of mortgage for 1000 years. This deed contained a reservation of a peppercorn rent during the term to husband and wife, and to the heirs and assigns of the wife, and also a covenant by the husband for himself and wife, that they would levy a fine to the use of the mortgage for the term, and subject thereto to the use and behoof of the husband, his heirs and assigns for ever, and for no other use, intent, or purpose whatsoever. The clause for redemption provided that, upon repayment of the money, by husband and wife, or either of them, their or either of their heirs, executors, administrators, or assigns, the term should cease. On a bill by the wife and her children after the death of the husband, for a redemption, the Vice-Chancellor said, "This case is not distinguishable in principle from *Innes v. Jackson*. The limitation of the uses of the fine to the husband and his heirs has no connection with the purpose of the mortgage or the proviso of redemption, but is altogether a new settlement, which defeats the heir of the wife."

The wife has an equity of nearly the same nature, where, instead of pledging her real estate, she advances a sum of money, being her separate property, for the discharge of her husband's debt. In such a case, the question is, whether this advance was intended as a loan or a gift, and it has

If the wife advance her separate property as a loan to her husband, for the payment of his debts, she is entitled to stand in the place of the creditor.

Where wife joined her husband in the grant of an annuity out of her separate property, she was held to be entitled to have the husband's income applied to the discharge of the annuity in the first instance.

Where separate money of the wife applied by the husband, in the purchase of an estate, she will be an incumbrancer upon it to that extent.

been held, that, if it shall appear to have been the former, the wife shall stand in the place of the creditor as a stranger, and be invested with the same remedies. As is *Partridge v. Powlet*,<sup>a</sup> where the wife had a separate estate by virtue of her marriage settlement, and the husband having an incumbrance upon his estate, the wife advanced money to pay it off, and the receipt from the mortgagee was delivered to her; the question was, whether this was a bounty or a loan, as the receipt was not produced. Lord Hardwicke said, "If it is by way of loan, she, having a separate estate, must be considered as a distinct person, and is equally entitled to stand in the place of the mortgagee, as a stranger."

In like manner, where the wife joined her husband in a grant of an annuity, and the grant comprised as well her separate property, as property given to her for life, not to her separate use, to which her husband was entitled *jure mariti*, and the husband afterwards took the benefit of an Insolvent Debtors' Act, Sir John Leach, Vice-Chancellor, held, that the wife being a surety only in the grant of the annuity, which comprised her husband's property as well as her own, was entitled as between her and her husband, and the assignee under the Insolvent Debtor's Act and subsequent annuitants, to have the husband's income first applied in satisfaction of the annuity.<sup>b</sup>

It seems, also, that if a husband gets the separate property of his wife from the trustee, with or without the consent of his wife, and applies it in the purchase of an estate, she will be an incumbrancer upon it, to the amount of the money so applied, if the application of the purchase money can be clearly established, though there be no covenant on the part of the husband to purchase and settle land. This rule was sought to be established in *Lench v. Lench*,<sup>c</sup> where a widow filed a bill against the brother and heir at law of her deceased husband, insisting that estates of which her husband had died seised, had been purchased with part

<sup>a</sup> 2 Atk. 383

<sup>b</sup> Aiguilar v. Aiguilar, 5 Mad. 414.

<sup>c</sup> 10 Ves. 511.

of her separate property, and praying to have satisfaction out of these estates by virtue of an equitable lien. The bill was dismissed; not, however, on the ground that such an equitable lien might not be made out and supported, but because there was not satisfactory evidence that the money had been applied in the purchase. The equity of the wife to a lien on an estate purchased by her husband with her separate money, was not denied in the discussion of this case, or in the judgment of the Court; but the plaintiff failed in the proofs necessary to raise it.

Where the wife joins her husband in a mortgage of her *own* estate, with no other view than that of lending him the money, we have seen that she has not only a right to be indemnified, but also to redeem the premises. In like manner where she is entitled to a jointure out of her husband's lands, which were mortgaged at the time of the settlement, it has been held that the wife has the right of redemption, and that her executor may hold the lands until the mortgage money has been repaid with interest, because the tenant for life ought to be reimbursed the money she paid to set her estate free, and in the condition she ought to have been in.<sup>d</sup> On the other hand, if her jointure lands be unincumbered, and she, after marriage, join with her husband in a fine, and mortgage the land, and the husband dies, there her land is charged, and she shall pay her part towards disburthening the land; but her executors shall not hold the lands, until the mortgage money shall have been repaid, because she herself concurred in laying on the charge, and therefore must concur in the disburthening of it, according to the value of her interest.<sup>e</sup>

The widow has a right to redeem her jointure lands mortgaged before the settlement.

If the wife join in the mortgage of her jointure lands, after the husband's death, she must join in paying off the incumbrance.

<sup>d</sup> 1 Chan. Cas. 271. 2 Vent. 243.  
7 Bac. Ab. 639, 640.

<sup>e</sup> 2 Chan. Cas. 99, 100. 7 Bac.  
Ab. 639, 640.

## CHAPTER XIII.

OF THE EQUITY OF THE HUSBAND TO BE RELIEVED AGAINST  
A SETTLEMENT MADE BY HIS WIFE BEFORE HER MAR-  
RIAGE.

THE equities which have been detailed in the preceding chapters of this book, operate, and are intended solely for the benefit of the wife, or of those claiming under her.

Husband  
not to be  
deprived  
by fraud of  
his legal  
rights over  
the pro-  
perty of his  
wife.

The only object of these guards, which a court of equity interposes, is the protection of the interests of married women against the legal rights of their husbands. But the husband also has his equity ; and it is this, that he shall not be deprived by fraud of the rights which the law gives to him over the property of his wife. It is one of the rights of marriage, that the husband shall be entitled to the rents and profits of his wife's real estate during their joint lives, and sometimes during his own, and also that he shall have the entire dominion over her personal property. A woman, too, while she is sole, may dispose of her own property as she thinks fit ; but if such disposition derogate from the martial power over it, there may be circumstances under which an after-taken husband would be relieved against the instrument by which the conveyance had been effected, as being fraudulent against him.

If a wo-  
man con-  
vey her  
estate be-  
fore mar-  
riage, with-  
out the pri-  
vity of her  
intended

The rule laid down on this subject is, that if a woman make any conveyance of her own estate before marriage without the privity of her intended husband, or confess any judgment, or acknowledge any statute to affect her estate, other than such as were upon valuable consideration, they shall not affect the husband.\* The cases on this head of

equity may be reduced to four classes : First, where a conveyance has been made by the wife, of her own property to her own separate use. Secondly, where the conveyance has been made for her use by a third person. Thirdly, Where a conveyance has been made by a woman in contemplation of marriage, for the benefit of her children by a former husband. Fourthly, Where the wife has executed a security for money to a third person.

husband,  
he will not  
be bound  
by the con-  
veyance.

*Howard v. Hooker*,<sup>b</sup> is a case belonging to the first class. There a bill was filed by husband and wife to set aside a deed made by the wife before her marriage with the plaintiff, her husband, and that he in right of his wife might have all her benefit and interest in, or to the estate of Sir John Baker, and receive the rents and profits of the premises. It appeared that Lady Howard, previous to her marriage with the plaintiff Sir Philip, had by deed assigned to the defendants all the property which she derived from her former husband for her separate use, and that Sir Philip had after the marriage settled a jointure of 50*l.* *per annum* upon her. The decree was, “ It not appearing unto this Court that the said Sir Philip had any notice of the said deed till several years after the marriage, nor was privy or consented to the making of any such deed, but having intimation that Dame Elizabeth intended to dispose of her interest in her former husband’s estate from such husband as she should marry, broke off the treaty of marriage, which was afterwards brought on again by some friends of the said Dame Elizabeth, and that the said Sir Philip was induced to marry the said Dame Elizabeth, upon the hopes and confidence of having the interest she had in the estate of said Sir John Baker, her former husband, without which he would never have married her ; and that the said Sir Philip never knew of the said deed, but the same was a fraud upon Sir Philip ; and that therefore no use ought to be made thereof, and decreed the same be absolutely set aside,

Settlement  
by wife in  
contempla-  
tion of  
marriage,  
of her pro-  
perty to  
her sepa-  
rate use.

<sup>b</sup> 2 Chan. Rep. 81. 1 Eq. Cas. Ab. 59.

and no use to be made thereof against the said Sir Philip, or any claiming under him."

Settlement by a woman, in contemplation of marriage, of her property to her separate use.

*Carleton v. Earl of Dorset*,<sup>c</sup> comes under the same head. Lady Dayril, before her marriage, without Mr. Carleton's privity, had conveyed her estate to the defendants and their heirs, in trust that they should permit such person to receive the rents and profits, as she, whether covert or sole, should appoint. It appeared also that Lady Dayril had assured her second husband that he should enjoy her estate.<sup>d</sup> And it was decreed that the plaintiff, Carleton, should have the possession of the estate against the trustees. So in *Draper's case*,<sup>e</sup> "the Court seemed to incline, that if a woman doth secretly, without the knowledge of her husband, before marriage, convey a term of years in trust for herself, that this shall be in the power of the husband, so as he may either grant or release the interest of the wife."

Settlement by a woman, for her separate use, in contemplation of a marriage, which does not take place, not void against another husband.

In the above cases the settlements were made by the wives, in contemplation of the marriages, which afterwards took place. But if the settlement have been made by the wife for her separate use, in contemplation of a marriage, which did not take place, it will not be void against a subsequent husband. This was the case of *Lady Strathmore v. Bowes*,<sup>f</sup> the facts of which are very peculiar. Lady Strathmore, pending a treaty of marriage with Mr. Grey, conveyed all her real and personal property to trustees for her sole and separate use, notwithstanding any future coverture, which settlement was prepared with the approbation of Mr. Grey. In seven days afterwards, instead of marrying him, she married Mr. Bowes. Bowes, afterwards, by force, compelled her to revoke the uses of the deed of conveyance, to establish which, a bill was filed by Lady Strathmore, and Mr. Bowes filed his cross bill, praying, that the settlement to her separate use might be set aside, as fraudulent, being executed by the Countess before marriage, without his know-

<sup>c</sup> 2 Vern. 17.

<sup>d</sup> See 2 Cox's Rep. 33. This fraud is not stated in Vern.

<sup>e</sup> Freem. 29.

<sup>f</sup> 2 Cox's Rep. 28. 1 Ves. jun. 22. 2 Br. C. C. by Eden, 345.

ledge, and in derogation of his rights, and that the deed of revocation might be established. Mr. Justice Buller, sitting for Lord Thurlow, decreed that the settlement was valid, which was affirmed by the Chancellor on an appeal to him, and afterwards by the House of Lords.

The only rule which can be deduced from the above cases of *Howard v. Hooker*,<sup>2</sup> and *Carleton v. Earl of Dorset*,<sup>h</sup> is, that if a woman, during a treaty of marriage, convey her property to trustees in trust for her own separate use, and, at the same time, represent to her intended husband that he should have the complete dominion over it, such conveyance would be deemed fraudulent and void, as against such husband. And the inference to be drawn from *Lady Strathmore v. Bowes*,<sup>1</sup> is, that if a woman, in contemplation of a marriage with a person, whom she does not afterwards marry, convey her property in trust for her own separate use, such conveyance will not be deemed a fraud upon another person, whom she does marry, although she did not communicate to him the fact of such conveyance. But it would seem that, if the conveyance be made pending the marriage treaty, without notice to the intended husband, whom the woman afterwards marries, such deed will be deemed a fraud upon him. There is no case directly establishing this proposition, but Lord Thurlow gave a very distinct opinion to this effect, in his judgment in the above case of *Strathmore v. Bowes*. His Lordship's words were, "If a woman, during the course of a treaty of marriage with her, makes, without notice to the intended husband, a conveyance of any part of her property, I should set it aside, though good *primâ facie*, because affected with that fraud." And it seems to be a sound principle, that the concealment of such a fact under such circumstances, when such a relation is about to take place between the parties, should be treated as a fraud. Mr. Justice Buller, in his judgment in the same case, expressly says, that the bare concealment of a conveyance by a woman to her separate use is not

sufficient to make out a case of fraud, but that it is necessary to show other facts, and that the husband is actually deceived and misled. And his Lordship's judgment was pronounced on these grounds. But Lord Thurlow, who affirmed his decree, concurred in it on different grounds; for his Lordship thought that such a concealment was fraudulent against the husband, if the conveyance were made in contemplation of a marriage with the husband, who seeks to avoid it, but that where the conveyance was made in contemplation of a marriage which never took place, it was not fraudulent as against the person with whom it had taken place. Lord Rosslyn, also, on a subsequent occasion, says, "If a woman, previously to marriage, conveys her property, with the privity of her intended husband, it will be fraud." And his Lordship added, "*Strathmore v. Bowes* went upon this, that the deed was honest and proper, being made in contemplation of a marriage with another person, and with the consent of that person." So that it would seem, that concealment of the conveyance is not enough, unless it be the concealment of a conveyance made in contemplation of a marriage with the very person, who afterwards seeks to set it aside. And Lord Thurlow, on the hearing of the appeal before the Lords in the same case, went the length of saying, that though the conveyance had been made with a view to a former marriage, which had not taken place, and would have been fraudulent if the marriage had taken place; yet that it would not be a fraud upon any other husband, although the fact had not been communicated to him.<sup>k</sup>

Settlement  
by a first  
husband to  
the separate  
use of  
his wife,  
does not  
bind

In the preceding cases, the settlements had been made by the wives themselves upon themselves; but in the case of *Edmonds v. Dennington*,<sup>l</sup> which belongs to the second class of cases, the settlement was made by a first husband on his wife, and, therefore is not a case of a contemplated

<sup>j</sup> Ball v. Montgomery, 2 Vea. jun. 194.

<sup>k</sup> 6 Br. P.C. 427 edit. by Tomlins.

<sup>l</sup> Cited in Carleton v. Earl Dorset, 2 Vern. 17.



fraud upon a second marriage. The facts were, that a settlement was made on a woman by her intended husband on her first marriage, by which she was to have power to act as a *feme sole*, notwithstanding that marriage; and the husband dying, and she marrying again, the second husband not being privy to the settlement on the first marriage, it was decreed, according to Vernon's report of the case, that the second husband should not be bound by that settlement on the former marriage. It appears, however, that this report is erroneous: for the decree in the Register's book is, that the deed was established upon the ground of distinct notice to the husband.<sup>m</sup> It is, however, immaterial to the present purpose, which of these two accounts of the decision be the correct one, for either establishes this proposition, that if a woman, having a settlement to her separate use made on her by her first husband, conceal this fact from her second husband upon her treaty of marriage with him, he will not be bound by it, but it will be void as against him.

the second husband, if the fact be concealed from him.

However, although a woman cannot make a conveyance of her property for her own use in contemplation of marriage, which shall be valid against her intended husband, if the fact be concealed from him; yet if such a conveyance be made in the discharge of the moral duty of providing for the children of a former marriage, it will not be considered as a fraud upon the intended husband, though it had been concealed from him. As in *Blithe's case*,<sup>n</sup> where a widow having one child, and being possessed of a term for years, just before her marriage with the second husband, assigns this lease to two trustees, without the privity of her husband, in trust that she should receive the profits during life, and afterwards in trust for her child for life, &c. Upon a bill by the administrator against the trustees to compel them to convey the term to him, one of the resolutions of the Court was, "That the assignment made to the trustees was not fraudulent against the

If a woman convey her property, to provide for the children of a former husband, it will not be a fraud on a subsequent husband.

<sup>m</sup> 1 Ves. jun. 26.

<sup>n</sup> Freem. 92.

husband, but that he should be bound by it, so as that the child, after the death of the wife, should hold it." Such, also, was the case of *Hunt v. Matthews*,<sup>o</sup> where a widow, before she married the defendant, her second husband, assigned over the greatest part of her estate to trustees as a provision for her children by her first husband. The defendant got this deed into his possession after the marriage, and suppressed it.

The defendant insisted that this deed, made by the widow a *little before* the marriage, was fraudulent, and done with a design to cheat her husband. But the Court thought, that a widow might, with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first. It is evident, from the argument of the defendant's counsel in this case, and from the judgment of the Court, that the settlement was made pending the treaty of marriage with the second husband, for it was made "a little before her marriage," and "done with a design to cheat her husband," which it could not have been, unless the marriage had been in contemplation at the time.

Where the settlement has been made on the children before any treaty of marriage, good against the second husband.

If the settlement have been made on the children before any treaty of marriage with the second husband, then *a fortiori* it will be valid against him, although he had not been apprised of it. As in *King v. Cotton*,<sup>p</sup> where Lady Cotton, before any treaty of marriage had commenced between her and Mr. King, made settlements of different parts of her property in trust for herself during her widowhood, and afterwards for her younger children. The bill was filed by Mr. King, the second husband of Lady Cotton, against her and her younger children by a former husband, to set aside the several settlements made by her upon them before her marriage with the plaintiff, as being made without his privity and while she appeared the visible owner of the estate, and thereby induced him to marry her. It was proved in the cause, that the settlements were

made by Lady Cotton, in the most public manner, before the commencement of any marriage treaty between her and the plaintiff. It was also admitted, that Lady Cotton had never given any notice of the settlements to Mr. King. The Lord Chancellor dismissed the bill, as to that part which sought to set aside any of the settlements made by Lady Cotton on her younger children, saying it was a very reasonable thing for a widow, while it was in her power, to make a provision for her children by her former husband; and this being before her treaty of marriage with Mr. King, it had been impossible to have asked him to be a party thereto. Two of the preceding authorities seem to establish, that if the settlement be made by a woman before a second marriage, either for her own separate use, or for her children by a former marriage, at a period when there is no treaty of marriage in contemplation between her and the husband whom she subsequently takes, such settlement will not be considered fraudulent as against such husband, although no communication had been made to him of the existence of such an instrument.<sup>q</sup> However in *Poulson v. Wellington*,<sup>r</sup> where a widow had settled part of her property on herself and her children before any treaty of marriage had taken place between her and her subsequently taken husband, and afterwards upon her agreement to marry him, she made another settlement of her property, to which the husband was a party, reciting her former deed, and making a new disposition of that part of her property which she had previously settled on herself; Lord Chancellor King declared it to be clearly his opinion, that if the plaintiff, the second husband, had no notice of the first deed made by the wife, while she was a widow, this would have been a void deed, and fraudulent as against him. This opinion differs from a subsequent one given by the same Judge, in *King v. Cotton*,<sup>s</sup> above mentioned, where Lady Cotton had not informed her husband of a conveyance she had made of

p *Strathmore v. Bowes*, 2 Cox's C. C.  
28. *King v. Cotton*, 2 P. Wms. 674.

r 2 P. Wms. 533.  
s 2 P. Wms. 674.

part of her property for her children by her first husband, and yet it was held to be valid. ' But it must be acknowledged that, in *Poulson v. Wellington*,<sup>1</sup> the question of fraud did not arise, and was not discussed, the point of the case being merely on the construction of the two deeds, so that this case cannot be considered to have shaken the authority of the other decisions upon this subject.

A woman previous to her marriage, may execute a security for a debt, which will be valid against her after-taken husband, although concealed from him.

As a woman may, immediately before her marriage, convey her property for the conscientious purpose of providing for the children of a former marriage, so she may enter into securities for the discharge of a fair debt, which will be valid against her after-taken husband, even after her death. As in *Blanchet v. Foster*,<sup>2</sup> where a bill was filed by a husband after his wife's death, to be relieved against a bond given by her to her aunt just upon the marriage. Lord Hardwicke said, " If a woman about to marry, parts with her property, or gives a security or assignment, they are relievable against in this Court; but where a debt is contracted for valuable consideration, though concealed from the husband, it is no fraud on the marriage."

If a woman, in contemplation of marriage, execute a security without a valuable consideration, it will be void against the husband.

But if a woman immediately before her marriage, and without the knowledge of her intended husband, enter into an engagement to pay money to a person to whom she does not owe it, such a transaction will be deemed a fraud upon the rights of the husband, and consequently void. In *Lance v. Norman*,<sup>3</sup> the plaintiff's wife, the day before her marriage, was persuaded to enter into a recognizance of 2000*l.* without defeazance, to the defendant her brother, to which the plaintiff was not privy, to vacate which the bill was filed. The defendant insisted, that the plaintiff was suitor to his sister designing to gain her estate; but she, not being likely to have children, intended the defendant part of her estate, and upon that account gave the said recognizance, and at that time the said defendant was in the country, and no ways knowing of it, nor had contrivance in it, but the said plaintiff proving unkind to his wife, and turned her

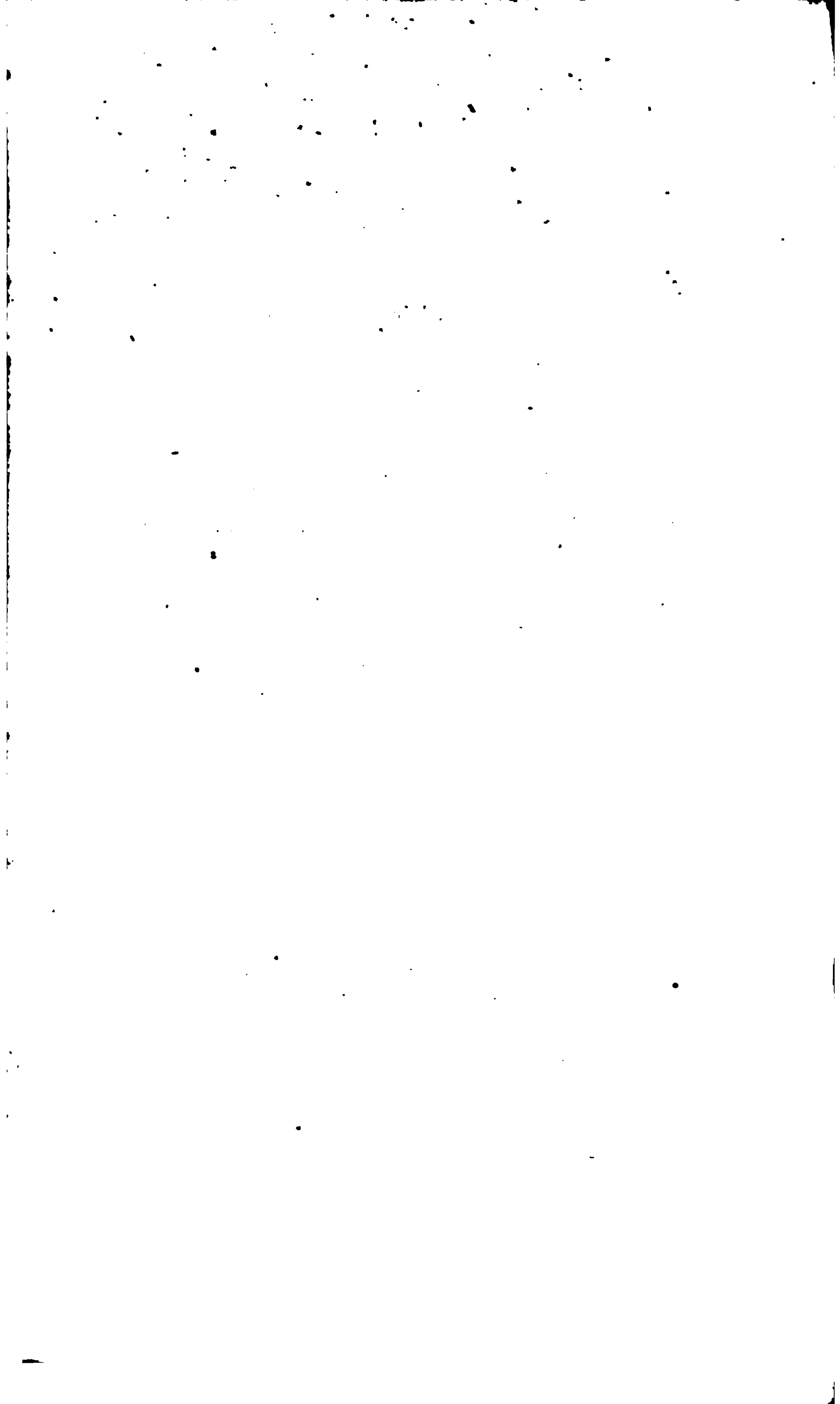
<sup>1</sup> 2 P. Wms. 533.

<sup>2</sup> 2 Ves. sen. 264.

<sup>3</sup> 3 Chan. Rep. 78.

out of doors, and parted with her, not making any provision for her, the defendant had put it in suit. The Court, being assisted with the Judges, was satisfied that the said recognizance was entered into the very day before marriage, without defeazance or the plaintiff's privity, and decreed the recognizance to be set aside.

And Lord Chancellor King, in giving his opinion in the case of *Cotton v. King*," put this case, "Suppose a woman, privately, before marriage, gives a bond, without any consideration, to a third person, for 1000*l.*, and marries one who knows nothing of this bond, surely equity would relieve against such bond, and, though, in case of a provision for younger children, there is the consideration of blood and natural affection, yet all these deeds, as against a purchaser, would be fraudulent and void."



# APPENDIX.

## No. I.

*Clause in a Deed or Will, limiting Personal Property to the separate Use of a married Woman.*

—— to *A. B.* and *C. D.* their executors, administrators, and assigns, the sum of —— *l.* in trust, to receive the interest thereof, during the joint lives of *G. H.* and *E. F.* his wife, and to pay the same to the said *E. F.* and her assigns, notwithstanding her coverture for her sole and separate use, from time to time, during the joint lives of the said *G. H.* and *E. F.* his wife (*a*), so that the said *E. F.* shall not sell, mortgage, charge, or otherwise dispose of the same in the way of anticipation. (*b*) And if the said *E. F.* should survive the said *G. H.* her said husband, then upon trust to pay the said principal sum of —— *l.* to the said *E. F.* her executors, administrators, or assigns; but in case the said *E. F.* should die in the lifetime of the said *G. H.* her husband, then in trust after the decease of the said *E. F.* to assign and transfer the said sum of —— *l.* to such person or persons, and in such shares, and subject, as the said *E. F.*, notwithstanding her coverture, by her last will and testament in writing, or by any writing in the nature of, or purporting to be her last will and testament, should limit or appoint (*c*), and in default thereof, upon trust

(*a*) If the clause were to stop here, *E. F.* (the wife) would have the power, by virtue of the words, "sole and separate use," of disposing of the entire of her life-interest in this money, by what is termed a "sweeping appointment," notwithstanding the direction that the payment shall be "from time to time." See Book III. Chap. VIII.

(*b*) As to the effect of this sentence, see pp. 329, 330.

(*c*) The object and operation of this clause is, to prevent the wife from disposing of the principal sum, while she is subject to the influence

to pay, transfer, and assign the same to the next of kin (d) of the said *E. F.*, their executors, administrators, and assigns, according to the statute for the distribution of the effects of persons dying intestate.

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No. II.

*Clause in a Deed or Will, limiting Real Estate to the separate Use of a married Woman.*

——— to *A. B.* and *C. D.* (the trustees,) and their heirs, during the joint lives of *E. F.* and *G. H.* her husband, upon trust to pay the rents, issues, and profits thereof to the said *E. F.*, or to such person or persons, as she, by writing, should direct to receive the same, during the joint lives of the said *E. F.* and *G. H.* for her sole and separate use, so that the said *E. F.* shall not sell, mortgage, charge, or otherwise dispose of the same in the way of anticipation. And from and immediately after the decease of the said *G. H.* her husband, in case the said *E. F.* should survive him, then to the said *E. F.*, her heirs and assigns for ever; but in case the said *E. F.* should die in the lifetime of the said *G. H.*, then to the use of such persons, for such estates and charges, as the said *E. F.* by her last will and testament in writing, or by any writing in the nature of, or purporting to be her last will and testament, executed in the presence of three witnesses, should direct, limit, or appoint,

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of her husband, by an instrument which would take effect during her life; she is therefore restricted to a disposition by will, by which alone she can convey it, if she die during her coverture. But, if she survive her husband, being then freed from the marital authority, it is given to her absolutely. See Book III. Chap. VI. pp. 306, 307.

(d) This ultimate limitation to the next of kin of the wife, in the event of her dying in the lifetime of her husband, is introduced for the purpose of excluding him from any share in this money, if she should not bequeath it to him; for the husband is now held not to be the next of kin of his wife. See Book III. Chap. VI. pp. 305, 306. See also *Watt v. Watt*, 3 Ves. 244. *Garriok v. Lord Camden*, 14 Ves. 372. *Bailey v. Wright*, 18 Ves. 49. 1 Swanston, 39. 1 Wils. C. C. 168.



and in default thereof, then to the use of *L. M.*, his heirs and assigns for ever.<sup>(e)</sup>

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### No. III.

*An Order that a Commission should issue, to take the Consent of a married Woman to waive her Equity.*

Upon motion this day made unto this Court by Mr. ——— being of counsel for the ———, it was alleged [*here state the particulars of the case.*] It is therefore ordered, that the said *S. H.*, the wife of the said *L. H.*, do attend before *A. B.*, *C. D.*, and *E. F.* Esquires (*f*), or any two of them, to be solely and secretly examined by them, separate and apart from her and husband, how and in what manner and to what uses she is willing and desirous that the said sum of money may be paid and applied; and the said *A. B.*, *C. D.*, and *E. F.*, or any two of them, who shall take such examinations, are to take the same in writing, signed by the said *S. H.*, and to certify the same in writing under their hands, and the signing of the said *S. H.* and such certificates are to be verified by affidavit; and upon the return of such certificates, such further order shall be made as shall be just.

(*e*) The plan of this instrument is similar to that of the preceding one. The object is, to exclude the husband from all controul over this property during coverture, and even after his wife's death, unless she should think proper to devise it to him, according to her power. And to effect this purpose, a life-estate is given to her in the rents and profits for her separate use, with a power to her to dispose of the capital of the estate by will, if she should die during the coverture; and if she should survive her husband, the whole estate is her's absolutely. And, as if it were limited to her heirs, in the event of her dying during coverture without having devised it, her husband, in such a case, would be tenant by the courtesy, it is upon the occurrence of that contingency, limited to a third person and his heirs, for the purpose of excluding the husband from such an interest.

(*f*) If the married woman reside in America, the order should be, that she should attend before *A. B.*, *C. D.*, *E. F.* and *G. H.*, counsellors and attorneys, of, &c. &c. and *L. M.* and *O. P.*, aldermen of the same, and that their certificate be verified by the seal of the province annexed thereto.

wife of the one part, and *C. D.* (the trustee) of the other part. Whereas the said *A. B.* and *Elizabeth* his wife have mutually agreed, in consequence of various unhappy differences, which have of late occurred between them, to live separately and apart from each other during the remainder of their lives. (A) And whereas the said *A. B.* hath agreed to allow his said wife an annuity of — *l.* during her life, for her maintenance and support. Now this Indenture witnesseth that, in pursuance of the said first hereinbefore mentioned agreement, by and between the said *A. B.*, and *Elizabeth* his wife, he the said *A. B.*, for himself, his heirs, executors and administrators, doth hereby covenant, promise and agree with and to the said *C. D.* (the trustee,) his executors and administrators, in manner following: that is to say, that it shall be lawful for the said *Elizabeth*, and that he the said *A. B.* shall and will from henceforth permit and suffer her, the said *Elizabeth*, at all times hereafter, during the joint lives of them the said *A. B.* and *Elizabeth B.*, to live separately and apart from him the said *A. B.*, and to go, reside, and be at such place or places, and with such family and families, relations, friends and others, as she the said *Elizabeth*, notwithstanding her coverture, shall from time to time think fit, wholly freed and discharged from all power, authority, government and restraint of him the said husband; in like manner, in all respects, as if she were a *feme sole*. And that he the said *A. B.* shall not, nor will, at any time or times hereafter, sue, molest, or disturb, or cause to be sued, molested, or disturbed, either by ecclesiastical process, threats, or otherwise howsoever, the said *Elizabeth*, his wife, for so living apart from him as aforesaid, nor any person or persons whomsoever for receiving, harbouring, or entertaining her during such separation. And the said *A. B.* doth hereby for himself, his heirs, executors, and administrators, further covenant, promise and agree with and to the said *C. D.* (the trustee,) his executors and administrators, that he the said *A. B.* shall and will, yearly and every year during the natural life of the said *Elizabeth*,

(A) The agreement stated here, is for a total separation, that is, until both husband and wife shall mutually agree to cohabit, the effect of which is, that though the husband should offer to cohabit again, it does not put an end to the agreement, which may be still enforced, if the wife insist upon it. But if the agreement had been for a mere temporary separation, then such an offer by the husband would extinguish the wife's claim to any maintenance after the offer made. See Book IV. Chap. IV.

well and truly pay, or cause to be paid unto her, the said *Elizabeth*, or unto the said *C. D.*, his executors and administrators, for her use, one annuity or yearly sum of — *l.*, free and clear of all charges and deductions whatsoever, by four equal payments, on the 1st day of January, the 1st day of April, &c. &c. in each and every year; the first of the said payments to begin and be made on the 1st day of — next ensuing the date of these presents; provided always, and it is hereby further agreed and declared by and between the said parties to these presents, that if the said husband shall, at any time during the joint lives of himself and the said *Elizabeth*, be sued for or in respect of any debts, goods, wares, money, apparel, or other things, incurred, bought, borrowed, or taken up, or received by or for the use, or by the means or procurement of the said *Elizabeth*, then, and in any of the said cases, it shall and may be lawful for the said *A. B.*, his executors and administrators, to retain and deduct to himself and themselves, out of the next and every succeeding payment of the said annuity of — *l.*, as far as the same will extend, all and every such sum and sums of money, costs, charges, damages, and expenses, as he the said *A. B.*, his executors and administrators, shall at any time hereafter be lawfully charged with, or be compellable or made liable to pay, for or on account of any such debts, contracts, matters and things aforesaid, or any of them. And the said *C. D.* (the trustee,) in consideration of the premises, doth hereby for himself, his heirs, executors, and administrators, covenant, promise and agree to and with the said *A. B.*, his executors and administrators, that he the said *C. D.*, his heirs, executors and administrators, shall and will from time to time, and at all times hereafter, save, defend, keep harmless, and indemnify the said *A. B.*, his executors and administrators, and his and their estate, of and from, and against all such debts and sums of money, for maintenance or any other account whatsoever, as she the said *Elizabeth* hath already contracted, or doth owe, or at any time whilst she shall live separate and apart from the said *A. B.*, and enjoy the said yearly sum of — *l.* in manner aforesaid, shall contract or owe to any person or persons whatsoever. (i)

In witness whereof, &c. &c. &c.

(i) As to the benefits to be derived from the insertion of this covenant, see pages 388, 389, 390.

## No VIII.

*In the above Deed, there is merely a personal Covenant, on the part of the Husband, to pay the separate Maintenance to his Wife ; but if it be intended that he should secure the Payment of it, by a Transfer of real Property, this may be effected by inserting the following Clause in the foregoing Instrument, immediately after the words " next ensuing the date of these presents."*

And for the more effectually securing the due payment of the said annuity in manner aforesaid, and in consideration of the sum of 5s. to the said *A. B.* in hand paid by the said *C. D.* at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged ; he the said *A. B.* hath granted, bargained, sold, and demised, and by these presents doth grant, bargain, sell, and demise to the said *C. D.*, his executors, administrators and assigns, all that capital mansion-house, &c. &c. in the parish of ———, and county of ———, and all those several closes of land, meadow or pasture ground called or known by the several names, &c. &c. situate at ———, in the parish of ———, and in the county of ———, (all which premises are now of the yearly rent or value of ——— l., and upwards,) and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof ; to have and to hold the said premises to the said *C. D.*, his executors, administrators and assigns, from the date hereof, for and during the full time and term of 99 years, if they the said *A. B.* and *Elizabeth* his wife shall so long live. Upon the trusts and to and for the intents and purposes herein mentioned, expressed, and declared of and concerning the same ; that is to say, upon trust, and to the intent and purpose that he the said *C. D.*, his executors, administrators, and assigns shall and do permit and suffer the said *A. B.* and his assigns to receive and take the rents, issues, and profits of all and singular the said premises, until default shall happen to be made in payment of the said annuity of ——— l., or of some part thereof. And in case the said annuity of ——— l., or any part or portion thereof, shall be behind and unpaid for the space of thirty days next after any of the said days or times on which the same is hereinbefore appointed to be paid as aforesaid, then

upon trust, by and out of the rents, issues and profits of the said hereditaments and premises, to levy and raise the said annuity of ———l. or so much thereof as shall then be in arrear and unpaid, together with all such sums of money, costs, charges and expenses, as he the said *C. D.*, his executors, administrators or assigns shall pay, expend, or be put to in raising the same, or otherwise, in the execution of the trusts thereof, or in anywise relating thereto. And upon the receipt of the said annuity, or such part thereof as shall be so in arrear, do and shall pay, apply and dispose of the same to and for such person and persons, and to and for such ends, intents and purposes as she the said *Elizabeth*, notwithstanding her coverture, shall from time to time, by any writing under her hand, order, direct, or appoint in that behalf; and for want of such order, direction, or appointment, then into her own proper hands, to the intent that the same may be to and for her sole and separate support and maintenance. And it is hereby agreed and declared, that the receipt or receipts of the said *Elizabeth*, or of such person or persons as she shall appoint to receive the same, shall be good and sufficient acquittances either to the said *C. D.*, his executors, administrators, or other person or persons paying the same.

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### No. IX.

*Clause to be inserted in the foregoing Deed of Separation, immediately after the words "next ensuing the date of these presents," if the payment of the separate Maintenance is to be secured by a transfer of money.*

And for the more effectually securing the due payment of the said annuity, in manner aforesaid, and in consideration of the sum of 10s. sterling, unto the said *A. B.* in hand paid by the said *C. D.* (the trustee) at or before the sealing and delivery of these presents, the receipt whereof is hereby acknowledged, he the said *A. B.* hath transferred, or caused to be transferred, the sum of ———l. three per cent. consolidated bank annuities, unto the name of him the said

*C. D.* in the books of the governor and company of the bank of ———, kept for that purpose, with this intent and meaning, that he the said *C. D.*, his executors and administrators, shall stand possessed of and interested in the said sum of ———*l.* and the interest, dividends and annual produce thereof, upon the trusts, and for the intents and purpose following; that is to say, in trust to pay to the said *A. B.* and his assigns the interest, dividends, and annual produce thereof, until default shall happen to be made in the payment of the said annuity of ———*l.* or of some part thereof. And in case the said annuity, or any part thereof, shall be behind and unpaid for the space of thirty days next after any of the said days or times on which the same is hereinbefore appointed to be paid as aforesaid, then upon trust by and out of the interest, dividends, and annual produce thereof, to retain the said annuity or so much thereof as shall be then in arrear and unpaid. And upon the receipt of the said annuity, or such part thereof as shall be so in arrear, that he the said *C. D.* do and shall pay, apply, and dispose of the same to and for such person and persons, and to and for such ends, intents, and purposes, as she the said *Elizabeth*, notwithstanding her coverture, shall, from time to time, by any writing under her hand, order, direct, or appoint in that behalf; and for want of such order, direction, or appointment, then into her own proper hands, to the end that the same may be to and for her sole and separate support and maintenance. And it is hereby agreed and declared, that the receipt or receipts of the said *Elizabeth*, or of such person or persons as she shall appoint to receive the same, shall be good and sufficient acquittances either to the said *C. D.*, his executors or administrators, or other person or persons paying the same.

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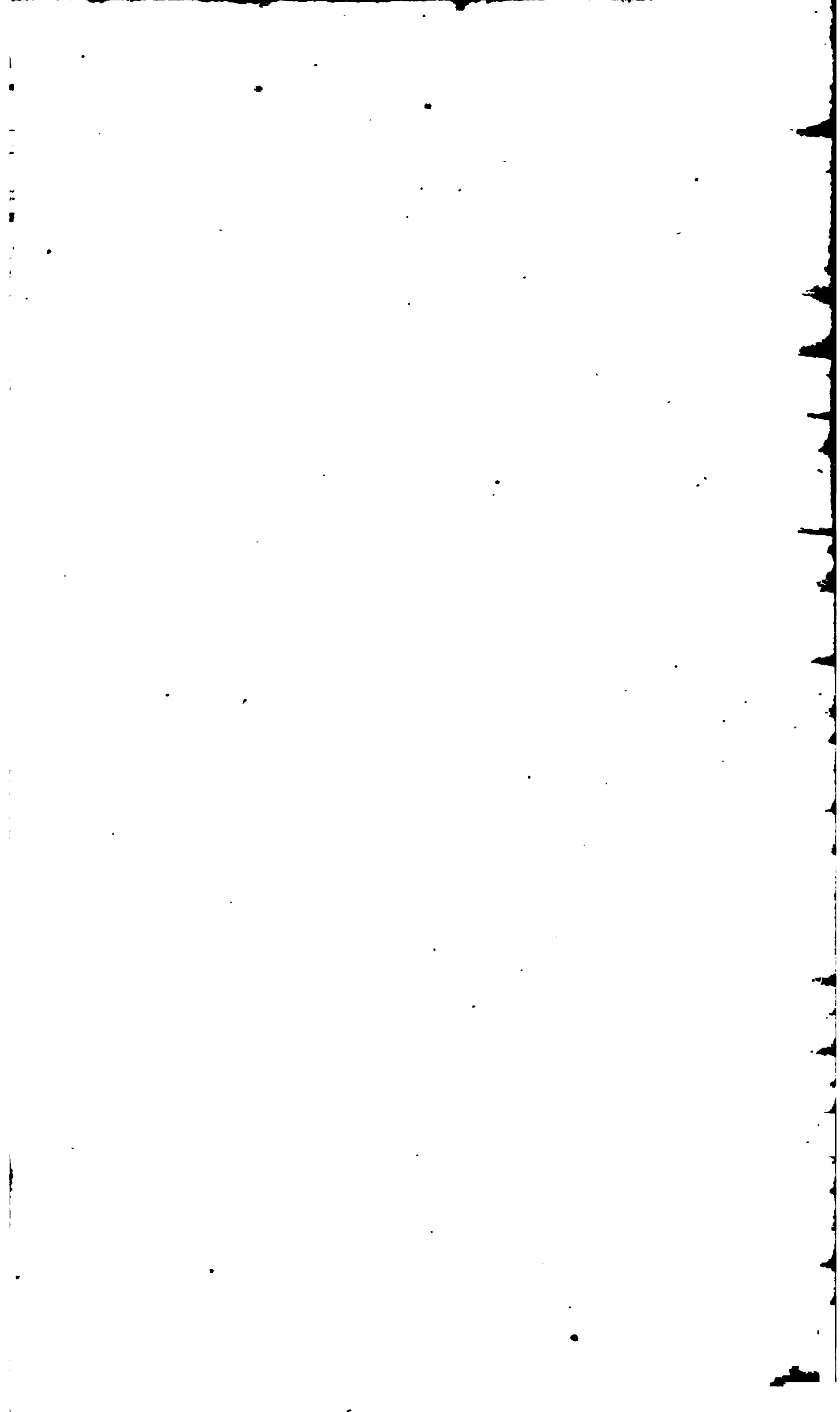
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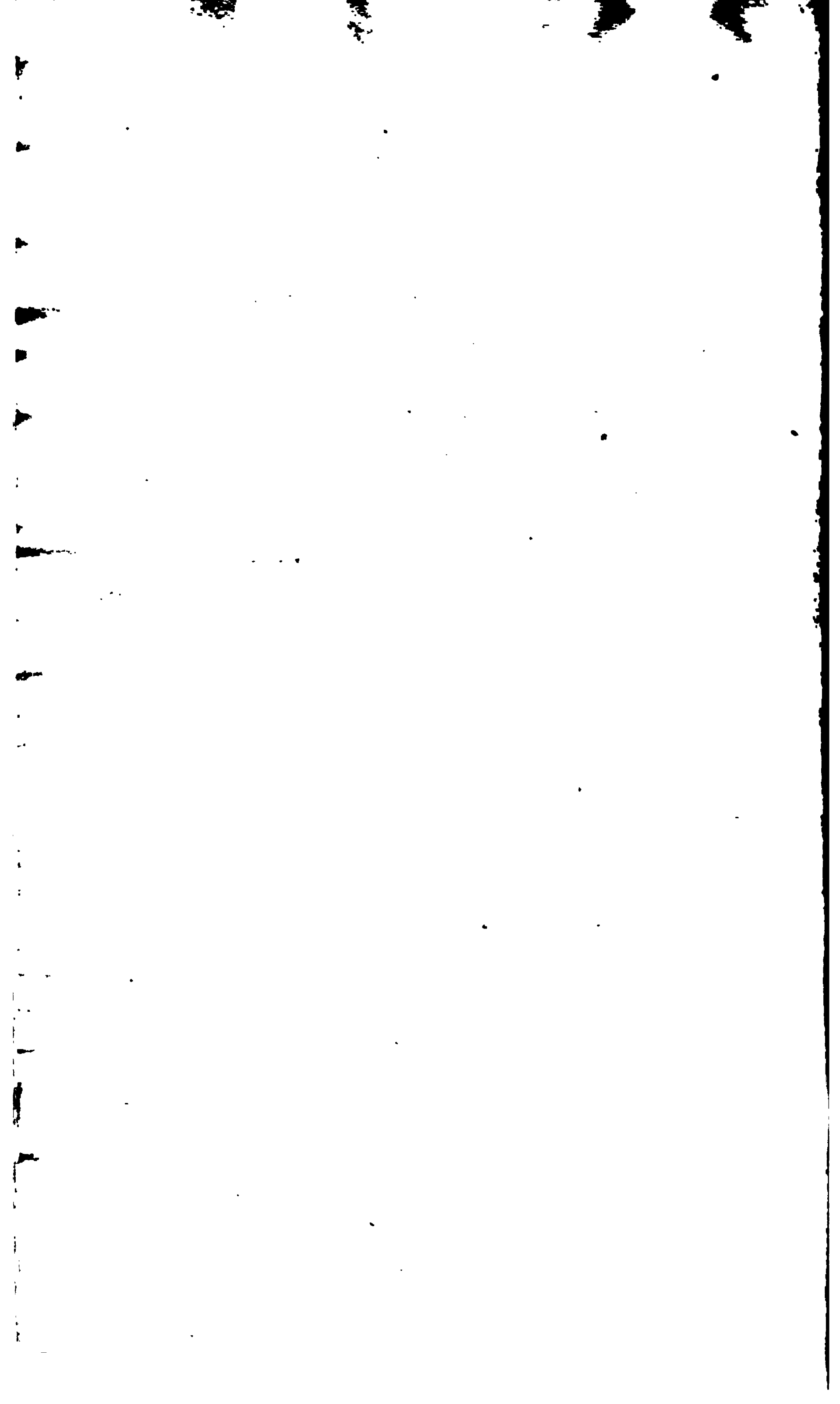
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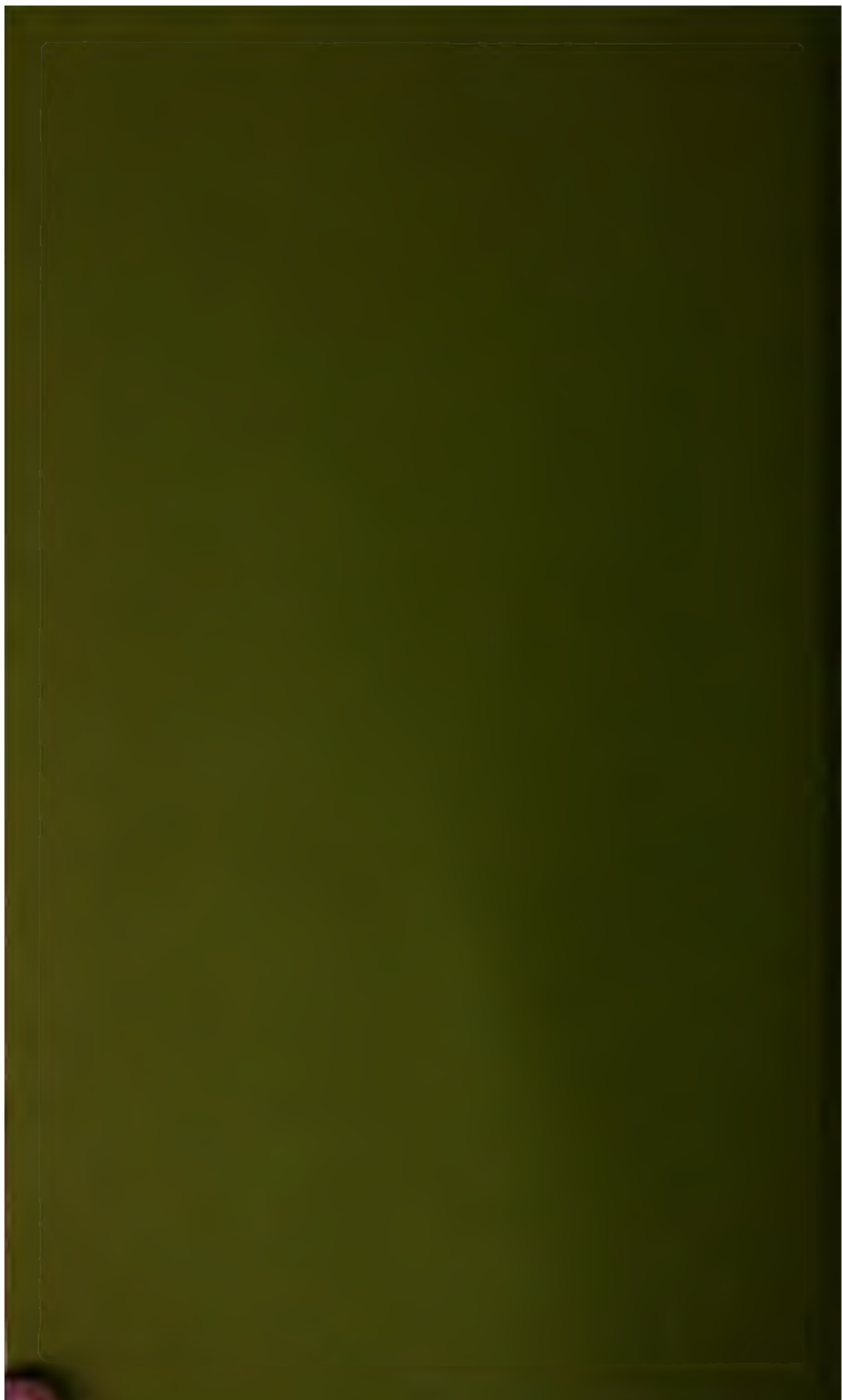












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